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Missouri Supreme Court



REPORTS

OF

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT.

2854 F

OF THE

STATE OF MISSOURI.

BY WM. A. ROBARDS,

ATTORNEY GENERAL, AND EX-OFFICIO REPORTER.

VOLUME XII.



JEFFERSON CITY

JAMES LUSK, PUBLI

1849

JUDGES OF THE SUPREME COURT OF THE STATE OF MISSOURI, UNTIL
THE FIRST DAY OF MARCH 1849.
HON. WILLIAM B. NAPTON,
HON. WILLIAM SCOTT,
HON. PRIESTLY H. McBRIDE,

By an amendment to the State constitution, ratified on the eleventh day of January, 1849, the offices of the several Supreme Judges became vacant on the first day of March, 1849. The following gentlemen were appointed Judges of the Supreme Court for the term of twelve years, from and after the first day of March, 1849.

HON. WILLIAM B. NAPTON,
HON. JOHN F. RYLAND,
HON. JAMES H. BIRCH.

ATTORNEY GENERAL:
WILLIAM A. ROBARDS.

SUPREME COURT.

JULY TERM, 1848.

RUBEY et. al. vs. BARNETT.

1. An absolute power of disposition over property conferred by will, not controlled by any provision or limitation, amounts to an absolute gift of the property.
2. Testator gave all his estate, both real and personal, to his wife during life: also gave her power to dispose of all his estate at her death. Held that the wife acquired only a life estate in the property of her husband. That the power of disposition given to the wife is a mere power, and if not executed, the property, both real and personal, at the death of the wife, descends to the heirs of the testator.
3. An administrator is a trustee, and cannot set up the statute of limitations in bar to the next kin or persons entitled to the distribution of assets.
4. A bill which seeks an account for rents and profits of real estate, and an account of personal estate is not multifarious.

APPEAL FROM MONROE CIRCUIT COURT.

CLARK & WELLS, for appellant.

1st. There is no misjoinder of action in this case, because the will affects alike all the property, real and personal. Story, Eq. Pl., 224 232.

2d. There is no misjoinder of parties. The complainants claim a joint undivided interest in the whole subject matter of the suit, as well in the land as in the personality, and they claim all under the same title. The interest of one cannot be settled and decreed without ascertaining the interest of the other. Story, Eq. Pl. 74, 77, 107, 109.

3d. The cause of action is not barred by the statute of limitation. The bill charges that he obtained possession of the property as administrator; being once a trustee he is always a trustee, and may be held to account at any time, at least at any reasonable time. 3d McCord, 467. It cannot be taken advantage of on demurrer.

4th. The will of William Horn gives his wife but a life estate with a power of disposition at her death. The fee is undisposed of by the will, and the wife making no disposition of the estate in her life, the whole passes at her death to the heirs, to be distributed under our statute of distribution. 4th Kent, Com. 535; 2nd Kent Com., 532, 4th Kent, 332, 319; 16th John R., 585. 6; 7; 2nd Wilson 8; 1st Dana, 229; Vance and Wife vs. Campbell's heirs. 2nd Dana 426; Pate vs. Barnett and Wife; 3d Littel, 415, Lillard vs. Robeson; 11th B. Monroe, 450; 3d Leigh 353, Boswell exr. vs. Anderson admir.

SUPREME COURT OF MISSOURI,

RUBEY, ET AL, VS. BARNETT.

GLOVER & CAMPBELL, for appellee.**FIRST PROPOSITION.**

The will vested an absolute estate in Polly Horn to the property devised to her. This conclusion is enforced by many reasons arising out of the language of the instrument, and the circumstances of the parties.

1st. The introductory clause in the will proposes to dispose of the whole of the testators interest, and when such is the case, these words indicate the testators intention, and the subsequent words must be construed, if possible, to accord with this intention. 6 Cruise Dig., 229, No. 20; 6 Taunton, 410; 18 Vesey, 193; 2 Atkins, 102.

2d. The power which the will gives to the devisee over the estate devised, is unlimited and absolute; she might have conveyed it or devised it at pleasure. In Tomlinson, vs. Dighton, 1 P. Will, p. 149, the devise was to the devisee for life, and then to be at her disposal: held to be a power to convey by deed.

3d. The intention of the testator to pass an absolute estate, is enforced by that portion of the devise which exempts her from any security as his executor. If no one but herself was to be interested in the property, then there is propriety in relieving her of this burden. But if he wished to secure the estate to others at her decease, this clause in the will cannot be accounted for.

4th. The want of any devise over to any person in the event of her death, is a powerful circumstance, showing an intention to pass an absolute estate. 12 Pick., 31. Now to the rational mind a devise over is stronger evidence of an intention to give an estate for life, than the employment of the words "for life," or "during life," for it is competent, after giving a life estate, to pass the balance of the interest by another clause, as has been often done, to the devisee for life. But a clause in the conclusion of a devise which gives the estate over to another, certainly would seem to preclude all construction; nevertheless, such a clause has always given way to a general power; why not the words here used give way to this power?

5th. The condition of the testator as disclosed by the will, goes to strengthen this view. He had no children, and might well be expected to give his wife all he possessed; most men in like cases would do so. Had he intended any portion of his estate for his collateral kin, it is most reasonable to presume he would have given them some present interest. His wife did not need the \$20,000 which he left, and if in any event he had designed any part of it to go to the appellants, he would have divided it at once with them and her. It seems plain to us from the whole will and "surrounding circumstances," (12 Mod., 596,) 4 Kent, that the words "as long as she may live," are to be regarded merely as a declaration that in the nature of things she could enjoy no property beyond this period, and not as a limitation upon the degree of interest given to her; and that the broad and unqualified introductory words "all my estate, both real and personal," the absolute power of disposition in any way she might "think most advisable," the exemption from "surety," the want of any devise over after her, and the circumstances named certainly ought to enlarge the estate given here to an absolute one if any words could do so.

6th. As to the personal estate named in the will, the devisee took an absolute estate, because there is no reversion of a chattel after a life estate granted therein; there may be an executory devise or a remainder, but this is neither; and it has never been held that a reversion arises by operation of law in such property. 2 Kent, 352. Cases of reversion in slaves are numerous in those States where slaves, as to the law of "wills and descents," have been put on the same footing with real estate, but such is not our statute law.

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SECOND PROPOSITION.

But if we shall be in error as to the foregoing points, and the court shall be of opinion that the will vested only an estate for life in the devisee, and that the appellants have taken a reversion in the real estate of William Horn, deceased, the question arises, what sort of a title has reverted to them; a legal or an equitable title? We must think if any right has passed, it is a legal right. The idea of an equitable title is always contrasted with a legal one. If A has an equitable right to land, it is because B withholds a legal right. If these appellants have an equitable right in whom is vested the legal title—not in William Horn, for he is dead—nor in Hutchins Barnet, for the bill avers that it was in Horn just before his death, and does not show how Barnet could have got it. If it is in any body else, the wrong party has been sued; and if it be in the appellants, their remedy was not here, but at law. They have consequently no equity to have this land decreed to them. As to the slaves, the remedy was also at law. The will of Horn was executed by the executor when he placed the slaves in the hands of the devisee for life. By virtue of this act the estates in remainder or reversion, if any, became vested, and when the life estate fell, the legal right and cause of action was perfect in the next taker. 4 Kent, 201.

THIRD PROPOSITION.

The demands of the appellants, except such as purport on the face of the bill to belong to the infants, or to be derived from married women, are barred by the statute of limitation, and for so much of the matter of the bill therefore as concerns the interest derived from the adults, the demurrer was properly sustained at all events. (Rev. C., 1845, p. 840 § 11.) Kane, vs. Bloodgood; John Chy., R. p. 90, Ib., 127. The statute of Lim is a bar when the bill itself, as in this case, shows the necessary continued adverse possession. Story's Eq. Pl., p. 496, No. 503, and the note.

FOURTH PROPOSITION.

The bill is multifarious in joining the administrator of Horn, against whom the distribution is demanded, with Hutchins Barnet as tenant of the real estate, for the administrator and the tenant are the same persons, yet they cannot be joined; the subject matter, wrongs and rights involved, being separate and distinct. Edwards parties, p. 10. In 2 Simons, 329, the bill was for an account of the real and personal estate of decedent, and against the administrator, and was held multifarious. Here the bill prays for an account of the real and personal estate, and in addition asks a decree for the land itself. Lit. Sel., Cases 320; 4 Blacf., 331. This objection, if good, is fatal to the whole bill. 2d Am. Chy. Dig., 324 § 5, citing 2, Gill & John, 14; 5 Paige, 65.

FIFTH PROPOSITION.

The bill was attempted to be sustained in the court below on the ground of partition. But no partition is granted by a court of equity when there is a perfect legal title in the plff. 1, Story Eq., p. 605 § 651.

SCOTT, Judge, delivered the opinion of the Court.

William Horn being seized and possessed of a large real and personal

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estate, consisting of lands, slaves, money, evidences of debt and other property, having no children, made the following will: "First, my will is, that my beloved wife, Polly Horn, have all my estate, both real and personal, so long as she may live: secondly, my will is, that my wife dispose of all said estate as she may think most advisable at her death. I do hereby appoint my beloved wife, Polly Horn, sole executor of this my last will, and it is my will for her not to give security as my executor." During the year 1833, in which the will was made, and afterwards Horn died, and his will was admitted to probate. Afterwards, in September 1836, Hutchins Barnett took out letters of administration with the will annexed, on the estate of William Horn, and intermarried with the wife, Polly Horn. They were not long married before Barnett's wife died without children, and without having made any disposition of the estate she acquired by her former husband's will. It is alleged that Barnett as administrator has not made full settlement of his accounts, that he has not accounted for the rents and profits of the real estate, and made no distribution of the personality, but claims the whole as his own in right of his wife under the will of William Horn.

A bill was filed by the heirs at law of William Horn, and the assignees of some of them praying an account, and that the property might be decreed to them.

A demurrer to the bill was sustained, and the bill dismissed.

The important question in the case is what estate Polly Horn took under the will of her first husband; whether an absolute one, or only an estate for life.

It has always been held that an absolute power of disposition over property conferred by will, not controlled by any provision or limitation, amounted to an absolute gift of the property. A power to dispose of a thing as one pleases, must necessarily carry along with it a full property in it. Hence whenever property is conveyed by words conferring a power of disposition as one pleases, or as he may think best, it is in law an absolute gift of the property to him on whom the power of disposition is conferred. A devise to B to dispose at his will and pleasure, gives a fee, and devises to dispose of for payment of debts, or to give, sell, or do therewith at pleasure, are held to give an absolute estate in lands. But a devise to a wife *for life*, and after her decease she to give the same to whom she will, passes but an estate for life with a power; yet if an *express estate for life* had not been devised to the wife, an *estate in fee* would have passed by the other words. Barnwell's exr., vs. Anderson's admr., 3 Leigh, 356.

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This is the distinction which prevails throughout the cases. When an express estate for life is given, and afterwards a power of disposition is conferred, then the devisee takes but a life estate with a power of disposition, and if no disposition is made, the reversion will go to the heirs of the devisor. But if there is no previous devise of a life estate, but a simple power of disposition is bestowed, then the devisee takes an absolute estate. In the case of *Jackson vs. Robins*, 16 John Rep., 587, which appears to have been well considered, it was held to be an incontrovertible rule, that when an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee, and the only exception to the rule is where the testator gives to the first taker an estate for life, only by certain and express words, and annexes to it a power of disposal. "In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion. This distinction is carefully marked and settled in the books :" so in *Comy. Dig.*, 408, it is said a man may give a power or authority by will which is a naked authority not annexed to an estate, as if he devises it to A for life, and afterwards that it shall be at his disposal to any of his children then living, he has but an estate for life, with a naked power to dispose in the manner directed by the will.

An express estate for life negatives the intention to give the absolute property, and converts the words giving a right of disposition into words of mere power, which standing alone would have been construed to convey an interest.

The case of *Pearson vs. Otway*, 2 Wil. 7, was relied on to show that a devise for life with a power of disposition at pleasure, gave an estate in fee. But in that case, the limitation was of an estate in tail, for it was to be enjoyed by the devisee without molestation, and after her death to her lawful issue. It is moreover to be remarked that the court in the case of *Jackson vs. Robins*, above cited, refer to this very case in support of the doctrine therein contained.

The case of *Tomlinson vs. Dighton*, 1, P. W. 149, so far from sustaining the ground assumed by the appellee, is a clear and full recognition of the law as above stated, both by the court and the counsel.

It is useless to look into the will to ascertain the intent of the testator. He has clearly given his wife a life estate by express words, with a power of disposition, which the law holds to be a mere power, and if not executed, the property at the death of the wife must descend to the heirs of the testator. None of the cases cited and relied on by the appellee, over-

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throw or even contradict this principle. It seems to be a fixed and settled rule of law, and cannot be disregarded by the court.

The rule above stated is applicable both to real and personal estate.

There are cases in which a party may avail himself of the statute of limitation by demurrer. Story, Sec. 503. But this is not a case in which the statute of limitation is applicable. No lapse of time is a bar to a direct trust, as between trustee and *cestui que trust*. An administrator being a trustee, cannot set up the statute of limitations in bar to the next kin or persons entitled to the distribution of assets. *DeCouche, vs. Savitier*, 3 J. C. R., 190; *Kane, vs. Bloodgood*, J. C. R., 126.

Under our system of law, which gives an administrator control over the real estate for some purposes, there is no multifariousness in a bill which seeks an account for rents and profits of real estate, and an account of personal estate.

In England, an heir and the personal representatives could not be joined in a bill for an account for obvious reasons, but that principle is not applicable in this State. Barnett received the estate as administrator; there is then no form of action at law in which the personality could be recovered by the heirs and distributees of the estate.

The other judges concurring the decree will be reversed, and the cause remanded.

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1. A sale, by a sheriff under execution, of an undivided and unknown interest in two adjoining tracts of land, at the same time, is valid.
2. Inadequacy of price is not, of itself, sufficient ground for setting aside a sheriff's sale of real estate.
3. The fact, that the sheriff sold at an earlier hour in the morning than is usual for making sales, would not invalidate a sale, if legally conducted in all other respects.

APPEAL FROM JEFFERSON CIRCUIT COURT.

COLE, for the appellants.

1st. It is admitted that fraud will vitiate a sheriff's sale, and that a purchaser cannot hold property who participated in such fraud.

2d. It is insisted that where the purchaser is without fraud, and for a valuable consideration, public policy requires that a party injured by the act of the sheriff, should be left to

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seek his redress in damages, instead of being permitted to pursue his property. 1 Mo. Rep. 754; Kean, vs. Newell; Hicks & Hammond, vs. Perry; 7 Mo. Rep. 346.

3d. In the absence of fraud and abuse of authority, a court of equity cannot, without a manifest violation of its principles, grant relief. To set aside a sheriff's sale there must be proof of fraud. Woods, vs. Monell; 1 John Chancy, Rep. 501. See also as to sheriff's sales, 8 Mo. Rep. 454; 1 M. R. 754; 8 M. R. 177; 7 M. R. 346; 9 M. R. 783; 4 Cranch, 403; 8 John R., 333.

4th. All fraud and abuse of authority being expressly denied by the answers of defendants below, and not disproved by complainant, must be taken as true; and the decree consequently erroneous, and should therefore be reversed.

5th. It is insisted that the instructions refused should have been given, and that the error is prejudicial, and that the decree should be reversed on this ground also.

FRISSELL for appellees.

It is insisted for the defendant in error that the decree is for the right party, and from the circumstances as alleged in the bill, and proved before the court, the decree ought not to be reversed.

That the great inadequacy of price is sufficient alone for the court to set aside the sale, the more especially as defendant in error offered to pay and has paid the representatives of Hicks the purchase money, interest and costs. 1 Story's commentaries on equity 324, 17 Vesey; 20 Gowland, vs. De Farre; Bowes, vs. Heaps, 3 Ves. & B. 117; 2 Vernon, 26 Berry, vs. Pitt.

The acts of the sheriff were so irregular in the advertising and in the selling two tracts together without the consent of Scott, and the result was so oppressive upon him that fraud might well be presumed, and the sale set aside for fraud. Hicks might well be charged with actual fraud. 8th Pickering, 212; Ves. & B. 2 vol. including vol. 3, 117.

McBRIDE, judge, delivered the opinion of the court.

John C. Scott filed his bill in the circuit court of Jefferson county, against John Hammond and Robert D. Hicks, in which he alleges that on the 15th November, 1838, the county of Washington recovered a judgment against him as principal, and John Perry and Joseph M. Stevenson as his securities, for the sum of \$318 07 for debt and damages and the costs of suit, upon which judgment an execution issued on the 31st October, 1839, directed to the sheriff of Jefferson county, which came to the hands of the defendant, Hammond, then acting sheriff of Jefferson county, who levied the same upon the complainant's interest in the E 1-2 of S W 1-4 of S 4, T 38, R 5, containing 80 acres, and on the fractional S W 1-4 of S 4, T 38, R 5, containing 124, 71 acres; both of said tracts being valuable in consequence of their having mineral on them, and for farming purposes. That said Hammond advertised the same to be sold on the 10th December, 1839, between the hours of

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nine and ten o'clock of the forenoon of said day, an hour much earlier than was usual for making such sales, and offered the same for sale, there being but few persons present, when the land was sold to Robert D. Hicks, for the sum of five dollars; both tracts having been offered and sold at the same time. That his interest in said land was an undivided equal half, and was reasonably worth two or three hundred dollars. That he was a non-resident of the county, and had no knowledge whatever that the land had been levied upon and was to be sold.

The bill further charges that Perry, one of the defendants in the execution, had an agent authorized to attend the sale, and make the land sell for its value; but in consequence of the sale having taken place at so early an hour, and both tracts having been sold at the same time, the agent did not reach the place of sale until after the land was struck down; that immediately thereafter the agent offered Hicks, the purchaser \$20 for his bargain, which he refused to take, and demanded \$50; but the agent not being authorized to pay so great a sum, declined the proposition. The bill further charges the defendants with a fraudulent combination to injure and oppress the complainant; and alleges that the defendant has no other estate out of which to pay the judgment at law, and unless the sale of the land be set aside and the same be again sold, that his securities will be compelled to pay the said judgment.

The defendants filed their separate answers to the bill, in which they deny all fraud and combination, and aver that the sale was a fair and an open one, conducted according to law. That the reason why the interest of the complainant was sold in both tracts at the same time, was, that it was uncertain and unknown what was the extent of that interest, and it was in consequence thereof that his interest sold for so small a sum, &c.

Replications were filed to the answers.

Hicks, one of the defendants, died, and the suit was revived against his heirs.

To sustain the charges in the bill, the complainant introduced one Clement B. Fletcher, as a witness, who testified that on the evening before the sale, Perry, one of the defendants, called at his house, where Hicks was, and when they were together, Perry requested him to attend the sale and bid in the land or run it up to the amount of the execution. Hicks proposed to attend to it for Perry; but Perry declined his services, stating that witness would do it for him. Perry sat down and gave witness written instructions on the subject. Early next morning Perry left for St. Louis, and shortly thereafter witness went to the court house

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to attend the sale ; but when he reached there the land had been sold. The sale was made between nine and ten o'clock, and whilst the court was in session—there were but few persons in town. Witness told Hicks that he would give him \$20 for Perry, if he would give up the land ; he replied that he would give Perry his bargain for \$50, but not less, which witness declined.

The land lies some where near Valle's Mines.

The defendants gave in evidence the record of the judgment and the proceedings therein, referred to in the bill ; also the sheriff's deed for the land in controversy to Hicks.

The court decreed in favor of the complainant ; the defendants moved for a new trial, which was overruled, when they excepted and appealed to this court.

The charge made in the bill against the defendants of combining and confederating for the purpose of defrauding and oppressing the complainant, being denied in the answer, and not supported by the evidence in the cause, the only grounds remaining for relief, are : *first*, that the sheriff sold the complainant's interest in two parcels of land at the same time ; and *second*, the inadequacy of price at which that interest was sold.

From the numbers given of the land in the bill, as also in the deed of the sheriff to Hicks, it is apparent that the two pieces of land are adjoining, and constituting as they do, only about two hundred acres, unimproved ; and the defendant's interest therein being undivided and unknown, we do not regard the sale as an abuse of that discretion which the sheriff in the discharge of his duty is called upon to exercise. It is not like the sale of detached pieces of land, where the one is not necessary to give value to the enjoyment of the other, and where, if one piece should bring a sum near its current value, would discharge the execution ; in such case the sale might be regarded as an undue exercise of discretion, and be set aside, on motion, by the circuit court.

We do not subscribe to the principle contended for by the complainant's counsel, that inadequacy of price alone is sufficient ground for setting aside a sheriff's sale. On the contrary, where the sale has been an open, fair and public one, where there has been no act done or superinduced by the sheriff or purchaser to prevent the property from selling for a higher price, public policy would indicate that such sales, although attended with great pecuniary loss, ought to be upheld and sustained. If the principle was recognized, its application would be entirely arbi-

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trary, as no rule could be established to govern the innumerable cases that arise.

Some stress is laid upon the fact that the sheriff sold at an earlier hour in the morning than is usual for making such sales. It was, however, within the hours prescribed by law, and we can readily conceive of a state of circumstances which would make it necessary for the officer to commence his sales at as early an hour, without subjecting him to just imputation.

We are therefore of opinion that the circuit court erred in its decree and that the same ought to be reversed: and the other judges concurring herein the same is reversed, and the bill is dismissed.

McDANIEL, vs. ORTON & MUDGETT.

1. A person having settled upon one quarter section of land and cultivated another—being entitled to elect, on which he will prove his right of pre-emption—cannot prove his right to and enter one upon condition that such entry should be canceled in the event that his right of pre-emption to the other should be established by the decision of the commissioner of the general land office.
2. The register and receiver have no authority to permit a party to vacate his entry.

APPEAL FROM THE BUCHANAN CIRCUIT COURT.

SCOTT, judge, delivered the opinion of the court.

This was a bill in chancery, filed by McDaniel, against Orton and Mudgett, to compel the conveyance of the title of a tract of land to McDaniel, to which he was entitled by pre-emption, and for which as was alleged Orton had obtained a patent by fraud.

The bill states, that the public land not being surveyed, McDaniel having settled on one quarter section of land, improved and cultivated another quarter section, by which he was entitled to elect, under the acts of congress of 1838 and '40, on which one of the two he would prove his right of pre-emption. That there were several claimants of the right of pre-emption to the quarter section which he claimed by virtue of cultivation. That on the trial of the right before the register and receiver, the land was awarded to Robert W. Donnell and the heirs of John Donnell. From this determination, the several unsuccessful

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claimants appealed to the commissioner of the general land office. That pending the appeal whose determination was long delayed, the sales of the public lands, including those to which he claimed a right of pre-emption, came on in pursuance of the proclamation of the President of the United States. McDaniel, lest he should lose both pre-emptions prior to the public sales, proved his right to and entered the quarter section on which he resided, under positive assurances, that in the event of its appearing that he was entitled to a pre-emption to the quarter section which he claimed by virtue of his cultivation, the entry should be cancelled. On the second trial the right of pre-emption was awarded to McDaniel by the land officers. From this decision another appeal was taken by Orton to the commissioner of the general land office, who referred the question to the secretary of the treasury, which officer issued a peremptory order to the land officers to allow Orton the pre-emption, on the ground that McDaniel had forfeited all claim, by entering the quarter section on which he had settled. Shortly after this order, a patent was issued.

It is charged that this order was procured by the fraud and misrepresentation of an agent of Orton.

There was a demurrer to the bill which was sustained and the bill dismissed.

In the case of Lewis, *vs.* Lewis, this court held that it could not interfere with a title emanating from the United States, but in cases affected by fraud or with a trust. In that case, there being no allegation of fraud other than that of a fraudulent combination (a formal part of all bills) a demurrer to the bill was sustained on the ground that no answer to a mere charge of combination was necessary, and the facts set forth showed that the party was entitled to no relief. In this case, the court might have required an answer to the bill, had not other facts appeared, which show that McDaniel is without redress.

We are not prepared to say that the opinion of the secretary of the treasury, that McDaniel, in entering the quarter section on which he lived, forfeited his right of pre-emption to that which he claimed by virtue of his cultivation. By law he could not have both pre-emptions. He was compelled to elect one or the other of them. Having taken one, though under a protest, as it were, and with assurances from the land officers that it should be cancelled upon its appearing that he was entitled to a pre-emption to the other quarter, he is bound thereby. That he may have been misled by these officers, cannot help him. He is in the condition of all those who act under mistaken or erroneous opinions.

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There is no authority in the register and receiver to permit a party to vacate his entry. Such a power might lead to great abuses, and produce much confusion in the system of land sales. By a conditional entry, making its continuance depend upon an event that may be long deferred, a sale of the public lands would be delayed and another proclamation would be necessary, thereby increasing the expenses attending the sale of them. The land not having been offered at public sale, would not be subject to private entry. All the adjoining lands having been sold, the sale of isolated parcels might not attract the number of purchasers that would attend the first sales.

The other judges concurring, the decree will be affirmed.

LESSIEUR, vs. PRICE.

GLOVER, CAMPBELL & WELLS, for plaintiffs.

1st. The plaintiffs showed a title good in itself; the entry of June 2, 1821; the survey August 5, 1821; and patent of November 13, 1822; constitute a valid and perfect title in J. B. Delisle to the land in dispute. If, then, there was no other title before the court, the plaintiffs would prevail.

2d. There being another title before the court conflicting with the plaintiffs, it becomes necessary to determine which is the elder title, as the elder title will prevail; 13 Peters, 436; 1 Peters, 668.

3d. The plaintiffs insist that their title began to exist on the 2d June, 1821, the date of the entry by Baptiste Delisle, and the patent of the United States to said Delisle, dated November 13, 1822, relates back to the said entry, as against any person in the mean time deriving title directly from the United States.

4th. The notice, survey and patent, vested a title in Baptiste Delisle, notwithstanding said Delisle may not have known of the existence of said documents. The delivery by the officers of said documents as the acts of government, to Langham and Hempstead, or any one, for the use of said Delisle, being beneficial to him, vest a perfect title in him; 4 Kent. Com. 454 and notes; 2, Salkeld, R 618; 1 Touchstone, 236, side page; 15 Wendell, 660; 6 Cowen, R 620; 8 Barn & Cress, 448; 5 Missouri R; 4 Day, 66; 12 John, 82.

5th. Delivery is not a requisite formality to the validity of a patent; it takes effect on passing the seal of the office without delivery; 2 Coke, top page, 276, note 17; Croke Eliz. 167; 5 Cowen, 458; 1 Cranch, 160; 1 Cov. & Hughes, page 738, chapter VII, No. 8.

6th. The State has not shown in evidence any title, valid in itself, to the land in dispute; far less one which can prevail against the plaintiffs' title.

LESSIEUR vs. PRICE.

POLK & LESLIE, for defendant.

1st. The proposition embodied in the second instruction prayed by Deft's counsel, is good law, and the court below committed no error in declaring it to be the law of this case.

2d. No man can take land by grant or conveyance, unless his assent is given to such grant or conveyance. This assent may be implied, it is true, as well as express ; but still it must exist. If it is not express, either in word or by act, it must be implied.

3d. But when the New Madrid location is made and perfected, and in order that the title to the new or located land should vest in the locator, the title that he had held in the New Madrid land, in lieu of which he has made the location, passes out of him *eo instanti et ipso facto* into the United States. The very act that gives him the new land, at the very moment of giving, deprives him of the New Madrid land. See 2 Story's Laws, 150 ; last part of the first section of the New Madrid act ; and Wear *vs.* Hickman, 5 Mo., 161.

4th. The court below ought to have given the first instruction prayed by deft's counsel ; and if this instruction had been given, even though it should be conceived that the court erred in giving the second instruction prayed by def't, still the judgment of the court below was right, and ought not to be reversed. For if the first instruction had been given, the judgment below ought and must have been for the defendant, as it was, whether the second instruction had been given or refused. As then, in that case, the giving or refusing the second instruction could not vary the result. The giving it ought not to be holden sufficient ground for a reversal of the judgment, if the court ought also to have given the first instruction.

To show that the defendant's first instruction ought to have been given by the court below, we make the following points :

5th. In the case of the New Madrid location under Delisle, the title to the land in Cole county did not pass out of the United States until the plat of the survey made by the surveyor general, under the notice to him, was filed in the office of the recorder of land titles ; or, in other words, and in the language of the supreme court of the United States, "the location referred to in the New Madrid act, is the plat and certificate of survey returned to the recorder of land titles."

For this, we refer to the case of Bagnell *et al vs.* Broderick, 13 Pet., 450.

We refer to it as of binding authority, and as being decisive upon the point. It is the decision of the court of the highest, and last resort in this very case under consideration. It is a decision of a court of the United States ; the supreme court of the United States, upon a law of the United States. The point was distinctly raised and adjudicated.

6th. The fourth and tenth instructions prayed by plaintiffs counsel, are, in principle, the same, and embody substantially, the same proposition. The only difference is the point of time to which they severally make the legal title conveyed by the Delisle patent, relate back. The fourth carrying it back to the date of the notice of location, the tenth to the time of making the survey.

7th. The plaintiff's counsel asked an instruction, the fifth in numerical order, to the effect "that a location of the four sections of land granted to the State for a seat of government, on two whole sections and five parts of other sections, was not in conformity with the act of congress, and therefore void, unless subsequently ratified by the government of the United States, or some department or officer thereof, thereunto authorized.

This, the court below would not declare to be the law of this case, and we say was right in so refusing.

8th. Again, it does not appear, as we understand the evidence, that the premises in question

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are not a part of the two *entire* sections selected, it does not appear that they are a part of the portions of sections selected.

Now the objection to the State's location presented by this instruction, is only that the sections must be entire sections. The act of congress does not require that the whole quantity should lie together, but only that the sections should lie as near as may be in one body. So that the grant might have been located in such wise as to include two sections together, and so as to have the remaining quantity disconnected with the two sections so located. In this case, there are also two full sections adjoining each other; and such might be the fact, and yet the location be in accordance with the grant, even on the view taken of it by the counsel of the plaintiffs.

9th. But, then we contend that the obvious meaning of the grant is the *quantity* of four entire sections. That is, congress meant to give to the State 2560 acres of land, for a permanent seat of government, to be located as near as might be in a body. To be located on any of the public lands exposed to sale—the only qualification being the direction to locate the quantity as near as might be in a body.

10th. On the sixth, seventh and eighth instructions prayed by plaintiffs, and refused by the circuit judges, we remark that we know not why, or by what authority, the State could be required to make or record her location in the office of any officer of the land department, or that it should be sanctioned by any officer of the United States, unless the grant itself, or some law or laws of the United States require it.

11th. On the ninth of plaintiffs instructions we barely observe that if the court below was right in refusing their fifth, it was also and *a fortiori* right in refusing the ninth likewise.

12th. So also the same may be said in regard to the eleventh of plaintiffs instructions. This instruction merely asserts the superiority of plaintiffs title to that of defendant; so that if the circuit court was right in giving the second of defendant's instructions, or if it ought to have given the first instruction prayed by defendant, and which it refused, why, then, in either case, it ought to have refused this instruction.

13th. The same remarks just made to justify the refusal by the court of the eleventh instruction prayed by the plaintiffs, may be repeated to justify the refusal of the twelfth.

ERROR TO COLE CIRCUIT COURT.

Opinion of Hon. P. H. McBRIDE.

The plaintiffs in error brought their action of ejectment in the Cole circuit court against the defendant for a lot of land in the city of Jefferson, and numbered 455 on the plat of said city, where the judgment being against them, they moved for a new trial, which having been refused, they excepted and sued out a writ of error from this court.

Upon the trial in the circuit court, the plaintiffs gave in evidence the following chain of title, to wit:

1. A confirmation made by the board of commissioners, on the 8th January, 1811, of two hundred arpens of land, in the county of New Madrid, to Baptiste Delisle, as described in a plat of survey certified 27th February, 1806.

2. The commissioner's, or N. Madrid certificate, issued 20th Novem-

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ber, 1817, to Baptiste Delisle for two hundred arpens, in lieu of his land, injured by earthquakes, lying in the county of New Madrid.

3. A notice of location given to the surveyor general by Thomas Hempstead and A. L. Langham, as the legal representatives of Baptiste Delisle, dated 2d June, 1821, that they had located two hundred arpens under the foregoing certificate, "so as to include fractional section number six, the north-east fractional quarter of fractional section number seven, and as much off the north part of the west fractional half of fractional section number eight, as will make the quantity of two hundred arpens, all in township number forty-four, north of the base line of range number eleven, west of the fifth principal meridian, south of the Missouri river."

4. A survey made by the deputy surveyor of the above location, dated 5th August, 1821, and filed 11th February, 1822.

5. Patent certificate, dated 25th February, 1822, and delivered to Charles L. Hempstead.

6. Patent from the United States to Baptiste Delisle, dated the 13th November, 1822.

7. Deed from Delisle and wife to Robert D. Dawson and Godfrey Lessieure, for the land patented to him, dated 13th September, 1842.

8. It was admitted that the parties suing as the heirs of R. D. Dawson, were his heirs, and their names were correctly set out.

9. It was further admitted that the defendant was in possession of the land in controversy, at the commencement of this suit.

10. The monthly and yearly value of the premises was agreed upon between the parties.

The defendant, to show title in himself, relied upon the following facts :

1. An act of congress, approved 6th March, 1820, the fourth paragraph of the 6th section of which provides as follows: "Four entire sections of land be, and the same are hereby granted to said State (the State of Missouri) for the purpose of fixing their seat of government thereon, which said sections shall, under the direction of the legislature of said State, be located, as near as may be, in one body, at any time, in such townships and ranges as the legislature aforesaid may select, on any of the public lands of the United States, provided that such locations shall be made prior to the public sale of the lands of the United States surrounding such location." United States at large, volume 3, page 547.

2. An ordinance, adopted by the convention of the State of Missouri,

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on the 19th July, 1820, accepting the said grant of land. R. C. 1845, p. 22.

3. An act of the legislature of the State of Missouri, entitled, "an act providing for the location of the permanent seat of government for the State of Missouri," approved 16th November, 1820, 1 Terr. laws, 649. This act appoints commissioners to select a site for the permanent seat of government, and requires them to make their report to the next session of the general assembly of said State.

4. An act supplementary to the foregoing act, approved 28th June, 1821. 1 Terr. laws, 773. This act provides for filling vacancies that may happen in the board of commissioners, and extends the time of making their report until the next session of the general assembly.

5. A joint resolution of the general assembly, approved 28th June, 1821. 1 Terr. laws, 780, requiring the governor of the State to notify the surveyor general for the State of Illinois and Missouri, and also the register of the land office in which the lands are selected, that commissioners appointed for that purpose "have selected the fractional sections six, seven and eight, the entire sections seventeen and eighteen, and so much of the north part of sections nineteen and twenty as will make four sections, in fractional township forty-four, south of the Missouri river, in range number eleven, to fifth principal meridian; and that he request the said surveyor and register to withhold the same from sale or location, until the general assembly determine whether said selection be accepted by the State."

6. An act of the general assembly, entitled, "an act fixing the permanent seat of government;" approved 31st December, 1821. 1 Terr. laws, 825. The first section of which accepts the land above described for the use and benefit of said State. The second section provides for the laying out of a town thereon; and the third section requires the governor to notify the surveyor general of the acceptance of said land by the general assembly, for the permanent seat of government, by transmitting to him an authenticated copy of said act.

7. Also, an act of the general assembly, entitled, "an act supplementary to the act fixing the permanent seat of government;" approved 11th January, 1822. 1 Terr. laws, 859. This act further provides for the laying out of a town on the land selected, authorizes the sale of the lots in said town, and prescribes the terms of said sale, and requires the commissioners to make a report of their acts to the next general assembly. It further provides that "any proposals made by any person or persons having claim to any part of the said lands select-

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ed for the permanent seat of government, in order that any claim or claims may be adjusted, *provided* nothing herein contained shall in any wise be construed to legalize or acknowledge such claim as valid in law," shall, by said commissioners, be communicated to the general assembly.

8. A proclamation by the president of the United States, dated 13th June, 1823, bringing into market by public sale, in the ordinary way, townships No. 40, 41, 42, 43 and 44, in range 11, west, and townships No. 40, 41, 42 and 43, in ranges 12, 13 and 14, of the fifth principal meridian. Sales to take place on the first Monday of October, 1823.

9. It was admitted that the premises in dispute are a part of the lands described in the foregoing resolutions; and the acts of the legislature given in evidence by the defendant subsequent thereto, and that the defendant holds whatever title the State had to the said claim.

To rebut the defendants title, the plaintiff gave the following evidence:

1. A copy of a letter from the governor of the State of Missouri, addressed to the surveyor general of Illinois and Missouri, dated 3d July, 1821, informing him of the selection made by the commissioners, for locating the permanent seat of government, and requesting him to withhold the lands thus designated, from sale or location, until the general assembly shall determine whether they will accept the same. This letter is endorsed as having been received 8th July, 1821.

2. A letter from same to same, dated 1st January, 1822, transmitting an authenticated copy of the act of 31st December, 1821, entitled an act fixing the permanent seat of government. This letter, by the endorsement thereon, appears to have been received on the day of its date.

3. A letter from the surveyor general to governor McNair in answer to the above letter, dated 2d January, 1822. After acknowledging the receipt of the letter of the 1st January, 1822, and the copy of the act of the general assembly of 31st December, 1821, the letter proceeds as follows: "I conceive it proper for me to inform you, for the information of the general assembly, that a part of this land (referring to the land selected by the commissioners, and accepted by the act of 31st December, 1821,) was located in virtue of a New Madrid certificate, on the 2d June, 1821, as represented on the sketch, and described in the entry made thereof, which you will find herewith enclosed. You will also receive a copy of a paper purporting to be a copy of an entry, or location of fractional section number 7, township number 44, north of

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the base line of range number 11, west of the fifth principle meridian ; this day filed in this office, by Major Taylor Berry. For the character of this last mentioned paper, as I view it, see my remarks on the back thereof."

4. It was admitted that the journal of the senate of Missouri, of the 23d November, 1821, shows that a committee of the senate, to which had been referred the report of the commissioners, for the location of the seat of government of the State, reported to the senate that the propositions made by Angers L. Langham ought to be accepted ; and that the seat of government should be permanently located on the eight hundred and ninety-two acres of land situated at Cote Sans Dessien. That one half of which Langham proposed to donate to the State, which was concurred in. On motion the report was laid on the table until next day, and afterwards, on the 25th November, 1821, the same was indefinitely postponed.

5. That the journal of the house of representatives shows that on the 28th November, 1821, the house had under consideration the location of the permanent seat of government.

On the 15th December next, following the committee of the judiciary of the house reported to the house the state of the title at *Cotes Sans Dessien*. On the 28th of same month, the house had the same subject under consideration.

6. It was further admitted that the journal of the house of representatives shows that on the 3d January, 1822, governor McNair laid before the general assembly the communication received by him from the surveyor general, of date 2d January, 1822.

7. A joint resolution of the two houses of the general assembly, requesting the governor to notify the president of the United States of the selection made for the seat of government, approved 14th December, 1822. 1 Terr. laws, 984.

8. An act of the general assembly of the State of Missouri, approved 19th December, 1822. 1 Terr. laws, 1018, authorizing the trustees appointed by the act to contract with the claimant for the removal of the New Madrid location from the lands selected for the seat of government on certain conditions ; if an adjustment be not obtained, then the trustees are required to select eight squares for public purposes, and the land so selected, together with the streets and alleys laid out, are condemned for public use, &c.

9. The survey of the lands selected by the State of Missouri, made

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in August, 1824, and approved by the surveyor general, on the 25th September, 1847.

Thereupon the defendant offered the following additional evidence, to wit:

1. A copy from the books of the recorder of land titles of the relinquishment of lands in New Madrid, by which it appears that the land in lieu of which the certificate in favor of Baptiste Delisle was issued, and which the plaintiff had given in evidence, was made by Carter Beamon.

2. A copy of a deed from Delisle, for the land in New Madrid to Carter Beamon, dated 4th August, 1817, acknowledged on same day, and recorded on the 17th September, 1817. It was certified by the recorder of land titles as being a true copy of the original on file in his office, and was also a sworn copy. Having first proved by a witness that he had applied to said recorder for the original which he had seen in his office and had compared with the copy, stating to him that he wished to use it on the trial of this case. But the recorder refused to let it go out of his office, saying that it was one of the files of his office, and that he was not authorized to let it go out of his office.

3. A certified copy of a deed from Delisle to Alexander Conia, dated 17th October, 1810, proved on the 20th January, 1823, before the judge of the county court of St. Louis county, and recorded on 6th May, 1823, in Cole county. This deed conveys the same land in New Madrid county.

The plaintiffs objected to the introduction of both deeds as evidence in the cause, and their objections were sustained, and said deeds rejected.

4. The defendant then read in evidence the deposition of John Baptiste Delisle, which shows that until the year 1842, he never knew that the certificate issued in his favor, by virtue of which the location on the land in question was made, had been issued, nor of the location, nor survey thereof, nor of the issuing or existence of a patent to him of said land, nor even that congress had passed a law for the relief of the sufferers by earthquakes in New Madrid county. And that consequently, until said last mentioned date, he never had given any assent to any of the proceedings touching the New Madrid location in his name.

On the close of the evidence, the counsel for the plaintiffs prayed the court to declare the following, in the nature of instructions, to be the law of this case.

1. The patent from the United States to J. B. Delisle, if the same be

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true and genuine, is sufficient in law to vest the legal title to the land therein mentioned in the said Delisle, if he were living at its date.

2. The deed from Delisle and wife to Robert D. Dawson and Godfrey Lessieure, if true and genuine, is sufficient in law to vest said title in said Dawson and Lessieure.

4. That if the New Madrid certificate granted to said Delisle, was, on the 2d June, 1821, located on the land in controversy, and was afterwards surveyed by a United States surveyor according to law—was approved by the surveyor general, and said land was finally patented to Delisle, according to said location and survey, then the effect of said patent is to vest said legal title in said Delisle, (as against any other title derived from the United States) from said 2d June, 1821, the date of said location.

5. That to vest the legal title to the four entire sections granted to the State for a seat of government, by the act of 6th March, 1820, it was necessary that said location should have been made of four whole and entire sections; and that a location thereof on two whole sections and five parts of sections, was not in conformity with said act, and therefore void, unless subsequently ratified by the government, or some department or officer thereof authorized so to do.

6. That a location of said land by the State, should have been made in the office of some officer of the land department of the United States, and that a record of said location should have been made in such office.

7. To give validity to such location, it should have been sanctioned by some officer of the United States having authority in disposing of the public lands.

8. That such location could not lawfully be made in the office of the surveyor of public lands in Missouri and Illinois.

9. There is no evidence before the court sitting as a jury that any location of said four entire sections ever was made in fact.

10. That if the New Madrid certificate granted to John B. Delisle was, on the 2d June, 1821, located on the land in controversy, and that said location was, on the 5th August, 1821, surveyed by the proper officer of the United States, and afterwards patented to said Delisle, in conformity to said survey, the effect of said patent is to vest the said title in said Delisle or his legal representatives, from said 5th August, 1821, as against any person deriving title from the United States after said location and before said patent.

11. That the notice of location, survey, patent and other documents and acts shown in evidence by the plaintiffs touching the location of the

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New Madrid certificate, No. 347, issued to John B. Delisle, &c., if true and genuine documents, show a better title than any which has been shown by the defendant.

12. That the neglect of the surveyor general or the recorder of land titles to perform any act of mere duty on their part towards the consummation of a title on said location, could not affect the rights of the party interested.

The court gave the instructions numbered 1, 2 and 3, but refused to give those numbered 4, 5, 6, 7, 8, 9, 10, 11, and 12.

The counsel of the defendant then prayed the court to declare the law as applicable to this case, to be as follows:

1. The title of the United States to the land described in the copy of the patent given in evidence by the plaintiff, was not divested out of the United States until the plat of survey made in pursuance of the notice given in evidence by the plaintiffs, was returned to the office of the recorder of land titles, and the title of the United States to the land located under the direction of the legislature of the State of Missouri, in pursuance of the fourth proposition of the sixth section of the act of congress of the 6th March, 1820, was vested in the State as early as the acceptance by said State, of the selection of land made by her commissioners. If, therefore, said acceptance was made prior in point of time to the returning of said survey to the office of the recorder of land titles, and if the land so selected and located is the same land mentioned in said copy of the patent given in evidence by the plaintiff, then said plaintiffs are not entitled to recover in this action.

2. If the John B. Delisle, who was the owner of the land in the county of New Madrid, in lieu of which the certificate No. 347 was issued, until the year 1842 knew nothing of the issuing or existence of said certificate, nor of the notice, survey or patent given in evidence by the plaintiffs, and never assented to the same prior to that date, and if prior to that date, the four sections of land mentioned in the fourth proposition of the sixth section of the act of congress, approved March 6th, 1820, had been located under the direction of the legislature of this State upon the premises in question, then no title passed to said Delisle in or to said premises as against the State of Missouri.

3. If Langham and Hempstead obtained the certificate of location, No. 347, claiming to be the legal representatives of J. B. Delisle and in that character made the location, when in fact they were not the legal representatives nor in any manner entitled to said certificate, or to the

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land located in virtue thereof, said location is void as against this defendant.

The court gave the second instruction asked, and refused the first and third.

Thereupon the court rendered a verdict for the defendant, which the counsel for plaintiffs moved to set aside, assigning the ordinary reasons therefor; but the court refused to set aside said verdict and to grant to plaintiffs a new trial, to which opinion the plaintiffs excepted, and now bring the case to this court by writ of error.

When this case was reached on the calendar, and prior to its argument, the several members of the court informed the counsel in the cause, of the relation which they sustained to the question involved, and to the parties thereto. Two of the members of the court own lots within the selection made by the commissioners for fixing the permanent seat of government, and one of them a lot within the claim of Delisle; whilst the other member of the court is related by marriage to one of the parties in the action. To this it was replied, that we, owning lots *are not interested in this suit*, so as to disqualify us from "sitting on the determination thereof," within the meaning of the 39 S. of the judiciary act, R. C. 1845, page 335. It is true, that the judgment in this case will not preclude our rights, but if the claim set up by the plaintiffs shall be adjudged superior to the claim of the State, under whom we derive titles, it would be idle for us to resist that claim; and hence, if we are not interested and disqualified, according to the letter, we are within the spirit of the act referred to. Notwithstanding, the counsel of the plaintiffs insisted on our hearing the cause, and the defendant's counsel not objecting, it was submitted on argument, and written brief to two members of the court.

In arriving at the conclusion which I have in this case, I am not aware of any considerations of interest having influenced my mind. I have endeavored to divest myself of all such feeling, and to decide the case according to law and the principles of adjudged cases.

I shall notice only two questions presented by the record, as the decision of these will be decisive of the plaintiffs right to recover. The first, is that presented by the first instruction asked by the defendant's counsel, and refused by the circuit court.

It was virtually conceded by the plaintiffs counsel in the argument, that the principle set out in the first instruction asked by the defendant, had been decided by the supreme court of the United States, in the case of *Bagnell et al vs. Broderick* 13 Peters, R. 436, and in the case of

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Barry *vs.* Gamble 3 Howards, R. 51. But they insisted that the point was not directly before that court, or was not important to the decision of the case; and that therefore the remarks of that court on the point, should not be regarded as binding authority. By an examination, however, of these cases, it will be seen that the point was distinctly decided by that court, also that that court considered it important in the decision of the cases.

In the case first above cited, the court declare that the United States never deemed the land appropriated, until the survey was returned," and again, "the only evidence of the location recognized by the government as an appropriation (of the land) was the plat and certificate of the surveyor;" and again, the court say, our opinion is, first, that the location referred to in the act, is the plat and certificate of the survey returned to the recorder of land titles, because by the laws of the United States, this is deemed the first appropriation of the land, and the legislature of Missouri had no power, had it made the attempt, to declare the notice of location filed with the surveyor general an appropriation contrary to the laws of the United States.

In the case of Barry *vs.* Gamble, 3 Howard, 51, the court use the following language: "By the certificate of the recorder of land titles at St. Louis, Lafleur was entitled to 640 acres of land, in compensation for lands of his injured by the earthquake in New Madrid county. On this, the survey of 1818 is founded. Its return by the surveyor to the office of the recorder, was the first appropriation of the land, and not the notice to the surveyor general's office, requesting the survey to be made as this court held in Bagnell *et al vs.* Broderick."

In each of the foregoing cases, there is a dissenting opinion; but in neither, is the correctness of the opinion delivered by the court, questioned, upon the point under consideration.

Although the supreme court of the United States labor under an error, as I apprehend, as to the power of the legislature of Missouri, in declaring what evidence shall be sufficient to support an action of ejectment, yet the remarks made by that court show most uncontestedly that the question of when the United States deem the public lands appropriated, under the New Madrid act, was before that court, and was considered and decided by the court.

The construction given to the act of our general assembly, may be the correct one, as it was doubtless the intention of the legislature, to give the action of ejectment, where the title had been so far matured as to need nothing but the patent to consummate it. The point of time,

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then, at which the land was appropriated, under the New Madrid act, so as to sever it from the public domain and exempt it from sale, or other disposition by the general government, may be regarded as *res judicatae*.

By a recurrence to the evidence offered by the plaintiffs, it will be seen that the re-survey made by the deputy surveyor, of the location of certificate No. 347, in favor of Baptiste Delisle, was made on the 5th of August, 1821, and the same was returned to the recorder's office, on the 11th February, 1822, and upon which the patent certificate was issued 25th February, 1822, and delivered to Charles L. Hempstead. Then, up to the 11th February, 1822, no effective act had been done, either by the locator, or the officers of the government charged with the subject, divesting the government of title to the land in controversy, or giving title to the plaintiff.

On the 11th February, 1822, the certificate of re-survey was returned to the recorder's office, when, if the title had been in the United States, it might have passed to Delisle or those claiming under him.

But by reference to the evidence of the defendant, it appears that on the 31st December, 1821, whilst the title was on the United States, the general assembly of the State of Missouri, by an act of that date, accepted for the use and benefit of the State, the four sections of land selected by the commissioners, on behalf of the State, and in pursuance to an act of congress, approved 6th March, 1820. This was a public act of the general assembly, and constituted all that was then necessary to be done on the part of the State, to vest in her all the title which the government of the United States had in and to the land selected. It was a full and complete consummation of the grant, made to the State of Missouri by the general government, for the location of her seat of government, and she needed no parchment evidence in the form of a patent from the president of the United States, to give her title, because her title was evidenced by an act of congress making the grant, and by an act of her own general assembly, accepting the same, and designating the land upon which it was to attach.

Having fully complied with the terms of the grant made by congress, the State had acquired title to the land in controversy, before the return of the certificate of re-survey to the recorder's office, and hence, at the date of the filing of the certificate of re-survey, the government of the United States had no title to the land attempted to be located, and consequently no title passed to Delisle.

I have assumed what I apprehend is incontrovertible, and needs no

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authority to sustain that a grant of land made by an act of congress, vests in the grantee, the title of the government as fully and effectually as a patent could do.

To impeach the act of the general assembly of 31st December, 1821, accepting the land selected by the commissioners appointed for that purpose, for the location of the permanent seat of government, extracts from the journals of the senate and house of representatives of the Missouri general assembly, were given in evidence, showing that subsequent thereto, the question of location was before these bodies, and was, on motion, indefinitely postponed; hence, if the action then had, is entitled to any consideration, it may be regarded rather as a ratification or approval of the location made by the act of 31st December, 1821. But I apprehend they are entitled to no weight.

My opinion, then, is, that the circuit court ought to have decided the law to be, as asked by the defendant in his first proposition, and so deciding that court should have found a verdict for the defendant.

2. Did the court decide correctly in declaring the law to be as set out in the defendant's second proposition.

The evidence shows that all the steps taken for the purpose of obtaining a grant of land from the United States, in lieu of land owned by John B. Delisle, lying in New Madrid county, and which had been injured by earthquakes, were taken by Langham and Hempstead, or at their instance, they representing themselves to be the legal representatives of Delisle, and without the consent, knowledge, or authority of Delisle, and that what was done by them in his name, did not receive his sanction or assent until the year 1842. But it is insisted that the law will imply his assent, as the grant was beneficial to him. This might be a safe implication, if the grant had been a pure donation, unaccompanied with any condition, but such is not the fact. The act of congress for the relief of the inhabitants of New Madrid county, whose lands had been materially injured by earthquakes, provides that where locations are made under the act, the title of the individual to the land injured, shall revert to and become absolutely vested in the United States. Instead, therefore, of its being a pure donation on the part of the government, it was a proffered barter or exchange of lands by legislative enactment, where the value of the land in New Madrid had been entirely destroyed, it might be regarded as a donation of other land to the individual owner; but where that was not the case, it could not be so considered. Now it is a well known fact that much of the land exchanged with the government under this law, is, this day, of more in-

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trinsic value than the land located in lieu thereof. Where this is the case, the government, instead of making a donation, has driven a profitable bargain. But the government is not chargeable with any wrong in this transaction, because the owners of land in New Madrid were not compelled to accept the provisions of the act. If they did so, it was a voluntary act on their part, and their assent should be evidenced by some affirmative act done by them.

There is, however, in this case, no ground for implication; all presumption of assent, is utterly excluded by the evidence of Delisle himself, who states that he was wholly ignorant of the existence of the act of congress on that subject, until the year 1842. He could not be divested of his land in New Madrid, until he assented to the exchange, and he could give no assent until he was informed of the act of congress making provision for those whose land had been injured. The title, then, to the land in New Madrid, remained in Delisle up to the year 1842, when he assented to what had been done by Langham and Hempstead in his name; and, as congress only intended to grant other land, on condition that the title to the land injured should revert to and vest in the government, no title could pass to Delisle until 1842; prior to which time, the State of Missouri had acquired title to the land in controversy.

But the act of congress cannot be regarded as a direct grant of land. It was a grant on condition that the party applying for the benefit of the act, should be the owner of land within the boundary that the county of New Madrid had on the 10th November, 1812, and whose land had been materially injured by earthquakes; and who would make the necessary proof before the recorder of land titles, for the then territory of Missouri.

These steps entitled the claimant to a certificate from the recorder, which he was to procure to be located by the principal deputy surveyor, who was to cause a survey thereof to be made, and return a plat of the location to the recorder, together with a notice in writing, designating the tract located and the name of the claimant on whose behalf the same shall be made, which notice and plat the recorder was required to record in his office, and was entitled to receive from the claimant for his services, the sum of two dollars for each claim. The surveyor was also allowed to charge the claimant fees for his services. It was therefore an offer to grant land, and the act throughout contemplates the consent of the claimant, by the doing of certain acts on his part, before he is to receive the benefit of the provisions contained in the law. Con-

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gress, in the enactment of this law, cannot be charged with the intention of forcing her bounty upon these people, much less is she chargeable with the iniquity of endeavoring to divest them, without their consent, of their title to land in New Madrid county. And I know of no principle of law which would authorize Langham and Hempstead, strangers as they appear to be to the New Madrid claimant, to institute and carry on proceedings by which he is divested of his title to the land owned by him in New Madrid county. They had no authority from Delisle to act in the matter, and their acts should be esteemed and held void and inoperative until sanctioned by him in 1842.

The assent of Delisle, in 1842, to the acts of Langham and Hempstead, in endeavoring to obtain for him other land in lieu of his land in New Madrid, cannot be made to relate back so as to cut out the title of the State. The doctrine of relation should never be indulged to the prejudice of rights equally meritorious.

It becomes necessary sometimes to effectuate justice, but should never be permitted where it works a manifest wrong to a party who had bona fide become interested in the subject matter.

When the title was acquired by the State of Missouri to the land in controversy, there was no legal obstacle in the way of the acquisition. The general government had the title to this land, as fully and completely as she had to any of the public lands; and, although she had proffered to give this land, as well as any other of the public lands subject to sale, to those who would accept the same, upon the conditions contained in the act of 17th February, 1815, yet Delisle had not, on the 31st December, 1821, taken the requisite steps to entitle him to its location.

Neither was there on the 31st December, 1821, any law of congress, or any order or direction of any department or officer of the government of the United States, excluding this land from the selection to be made by the State. The land being then subject to the selection, and having been selected by the State, no subsequent act of Delisle could affect the title of the State.

I conclude, therefore, that the circuit court decided the law correctly, in the second instruction asked by the defendant's counsel.

I do not deem it necessary to notice the minor points raised in the case, for however they might be decided, their decision ought not to control the final determination of the cause; and besides, judge Napton and myself do not concur fully upon the points above discussed.

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Judge Scott being disqualified by law, did not sit in the case, and judge Napton and myself differing in opinion, the judgment of the circuit court is affirmed.

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1. A *feme-covert* may institute suit in her own name, to secure her rights, where she lives separate from her husband, acting as a *feme-sole* under articles of separation, if her husband resides without the State.
2. Fraudulent conduct on the part of a witness, does not render him incompetent to testify. His competency in no wise depends upon his *credibility*.
3. Where an execution creditor, by his statements, induces persons not to bid for property at a sheriff's sale, and is thereby enabled to buy it at a great sacrifice, a court of chancery will not ratify the sale at his instance.
4. A held a mortgage upon property which was about to be sold to satisfy an execution, (having priority over the mortgage) in favor of B. Before the sale a verbal contract was made between them, that B should purchase the property, and upon payment of the amount of the execution and certain rents, he should convey it to A. B relies upon the statute of frauds to protect him. Held that B is not protected by the statute of frauds; that it is the province of courts of chancery to enforce such contracts.

APPEAL FROM MARION CIRCUIT COURT.

RICHMOND & WELLS, for appellant.

1st. For the purpose of settling the controversy between the complainant and defendant, all necessary parties are before the court. It is not material where a married woman sues as a *feme-sole*, that her husband should be a party to the suit if he be a non-resident of the State, or without the jurisdiction of the court. Story's Equity Pl., § 61, N. 4, 63, N. 3, 77, 80, 135, a. 229, also Sec. 72. Edwards on Parties, 3.

2d. The contract attempted to be enforced by the complainant, is not one required by the statute of frauds to be in writing; a party attempting a fraud cannot make use of the statute in aid of his object. Brown vs. Lynch, 1st Page Chancery Reports, 147. Roberts on frauds, 103, 128, N. 63; 1st, Vernon, 296; Ambler 67; 3d, Vesey, 152.

3d. At the time of the agreement between the complainant and defendant, and ever since, she, the complainant, could legally contract and be contracted with, sue and be sued as a *feme-sole*. More particularly could she sue or be sued in chancery in regard to her separate property: seven years absence raises a presumption of death. A married woman may acquire

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separate property, and an ability to act as a *feme-sole*, by implication arising from a long absence of the husband, or his acquiescence in her acts as a *feme-sole*. Bacon's Abridgment, (last edition,) Title, "Baron & Feme;" Letter M., Gregory vs. Pauls exrs.; 15th Massachusetts R. 31; Abbott vs. Bailey, 6th Pickering, R. 89, 83; Reeves Domestic Relations, Ch. 8, page 39; Roper on Husband & Wife, 1st. Vol., 157; 4th McCord, 148, 429; Fomblanque Equity, 97, 110, and notes; 17th, Sergeant & Rawle, 130, 361; 2d, Vernon, 613; Corbet vs. Poelitz, 1st. T. R., 5; 1st. Durnford & East., 4, 5, 8; Clancy on Rights, 64, 7; Chitty on contracts, 179, 80, shows that absence of seven years raises presumption of death; 1st. Peter's, 108; 1st. Bos. Pul., 358, 9: Kent's Commentaries, 2d Vol., 156, 63, 176

4th. The defendant should account for the rents and profits since his possession of the property, he being in the same situation as a mortgagee in possession. See Bainbridge vs. Owen, 2d J. J. Marshall, 465, 6, and citations; Pirtle's Dig., title "Mortgages."

5th. The complainant is entitled to double rents under the statute; the defendant having obtained possession of the property from complainants tenant, and held the same after the termination of the lease, and after a written demand for possession. Revised Statutes of Mo., 688.

6th. Although articles contemplating a separation of husband and wife are discountenanced in chancery, and a performance of them never decreed, yet the doctrine is different where the husband, (as in this case,) after the separation, enters into an agreement with the father or other relative of the wife, on certain conditions, and for a consideration. In such cases, the contract will be respected and enforced in chancery. 5th Bingham's N. C., 341, p. 141, 2; Beach vs. Beach, 2d Hill, 264; 1st Peters, 108.

ANDERSON GLOVER & CAMPBELL, for appellee.

In this case the wife, living separate and apart from her husband by mutual agreement, claims to be the purchaser and owner of property, to have loaned money and taken a mortgage, and by virtue of a contract through her agent with M. D. Bates, to have the right to redeem from Bates upon payment of his judgment. This she cannot do without the intervention of a trustee.

1st. Because it is in fact a dissolution of the marriage contract, a throwing off of the liabilities and disabilities of the matrimonial relations. 1st H. Black, 350, 5 Term R., 679; 6 Ib., 604; 8 Ib., 545.

2d. It is contrary to good morals and the policy of our laws. See 2d Story's Com., 652; I Clancy, p. 1; 2 Kent, p. 175; 11 Vesey R., 530; 3 Merivale, 256; 2 Wend, 422; 4 Page, 516; 1 Day R., 221; 2 Hill R., 264; 1 Mo. R., 476.

3d. The relation of husband and wife still subsisting unimpaired, the property in dispute, if not the defendants, is the property of the husband, and he must sue or be made a party. Rose was named in this bill as a non-resident, but after publication no further steps were taken as to him.

4th. If, however, her right to sue was admitted, still she was not entitled to a decree.

1st. Because the facts and circumstances show that the pretended debt set out in the mortgage did not exist, and that said mortgage was executed by Meredith to his mother-in-law to secure the property against his creditors for his own use.

2d. Because the averment in the bill that Bates would purchase the property for complainant, is not sustained by the evidence. If the evidence proves any agreement on the part of Bates, that he was to purchase the property at the second sale for any person—that person was Hugh Meredith.

4th. If, indeed, the agreement was proved to have been made by Bates, it was not in writing, and was void by the statute of fraud, which is insisted on by the answer. No trust arises,

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because the money was not Mrs. Rose's, but Bates'—and because the agreement was too uncertain to be decreed.

5th. The heirs of the deceased Meredith, who paid part of the purchase money, and who was a partner, and entitled to the benefit of the purchase as completed by his partners, and who was not a party to Bates' judgment at law, should have been a party to this suit.

6th. Suppose there was a valid consideration for the mortgage, the conduct of Meredith, whose acts are *pro hac vice*, the acts of Mrs. Rose in preventing competition by the assignment alleged, and in refusing to complete the first purchase on his bid, lest the surplus should go to creditors, was iniquitous, and sufficient to justify the dismissal of her bill.

McBRIDE, Judge, delivered the opinion of the Court.

Ann Rose, by her next friend, brought her bill against Moses D. Bates, and others, in the Marion circuit court.

The bill charges that she has for many years last past been acting as a *feme sole*, by virtue of a contract of separation between her husband, Samuel Rose, and herself, that she was possessed of a large property before her marriage with Samuel Rose, and upon their separation, a considerable portion of property, of various kinds, was secured to her, for her separate use, and free from the control of her husband.

That in the year 1835 the complainant removed from the State of Pennsylvania with her son-in-law, Hugh Meredith, to this State, converting, prior to her removal, most of her separate estate into money, she was enabled to raise about \$10,000, the wreck of a large estate, which she confided to said Meredith, and entrusted him with the management of her business generally. That the said Meredith being disposed to enter into business, she permitted him to use her money as he thought best, she claiming and receiving from him, in the meantime, a comfortable maintenance. That after a time the said Meredith became greatly embarrassed, so that she distrusted his ability to refund to her the amount she had loaned him; in this state of affairs, it was concluded between them, that Meredith should secure her one half of the amount loaned, by mortgage on his property; accordingly, on the seventh December, 1841, he executed to her a mortgage on a part of lot No. 8, in block No. 7, in Hannibal, to secure her in the sum of \$5,000. It was understood at the time, that a portion of the purchase money of said lot remained unpaid.

That the lot in question was purchased in July, 1839, by Hugh Meredith, Hamilton D. Meredith, and Napoleon B. Tapscott, jointly, of one Robert Buchanan, that a part of the purchase money was paid at the time, and a note executed for the balance, \$700, payable the first April thereafter; that Buchanan executed to them his title bond for a deed, when the purchase money was fully paid.

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That on the first October 1839, Hamilton D. Meredith departed this life, he not having paid any part of the purchase money, nor have his representatives, since his death, paid any part of the purchase money. That after his death, a part of the note given to Buchanan was paid, and a new note executed by Hugh Meredith and Tapscott, for \$300, that being the balance then remaining unpaid on said purchase; shortly thereafter, the last named note, by assignment, came to the hands of Moses D. Bates, who on the — day of — 18 — instituted suit thereon, against the makers, and prosecuted the same to judgment and execution. In the mean time, a dissolution of the partnership of Tapscott and Meredith had taken place, and on settlement between them, the former sold to the latter his interest in the corner of the lot in question, upon which part of the lot they had erected a large brick building.

That when the execution of Bates against Tapscott and Meredith was issued, both of them were insolvent. Bates supposing, however, that he had a lien on the lot for the balance of the purchase money, caused his execution to be levied thereon; whereupon the complainant became apprehensive that she would lose her security, she therefore urged Meredith to make some arrangement to settle the debt of Bates. Meredith assured her that it should be done, as Bates had told him, more than once, that he would give him time to raise the money, provided the payment was rendered secure. That to effect an arrangement with Bates, she authorized Meredith to act as her agent, but if no satisfactory arrangement could be made with Bates, then her agent was to purchase the property for her at the sheriff's sale, if the same was not bid so high as to disable her from paying the same.

That the lot having been levied on, was advertised for sale by the sheriff on the 10th January 1842, at which time Bates proposed to Meredith that he Bates would bid off the property for the benefit of the complainant, and to be conveyed by him to her, by quit claim deed, when she should pay the amount of the execution with interest and costs. But Meredith preferred bidding for the property himself, and would have secured the property to her and the debt to Bates, had not the latter, by bidding for the property himself, run it up to \$1010, when it was struck down to Meredith, who found it impossible to pay the sum bid, whereupon it was agreed between Bates and Meredith, that a re-sale should be made by the sheriff, on the thirteenth of the same month, when Bates was to become the purchaser of the property for the benefit of complainant, and the said property was to be conveyed to her by Bates, whenever she paid him his debt. In the meantime she was to retain possession, paying

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Bates at the rate of ten dollars per month for rent of the property, or interest on his money. A written instrument, setting forth the above contract, was to be executed by Bates immediately after the sale. Under this express agreement between Bates and Meredith as agent for the complainant, a second sale was made of the property, and Bates became the purchaser, at the sum of \$365, that being the amount of his execution.

That after the sale, on the thirteenth January 1842, Bates instructed his attorney to prepare an instrument of writing, to be executed by him, evidencing the foregoing agreement; it was, however, concluded upon consultation, that this was not necessary, as his honor was a sufficient guaranty. Accordingly, the complainant set about raising the money to pay Bates' claim, thereby to release herself from the exorbitant usury which he was charging her, and bring the matter to a close. But the complainant soon had reason to fear that further trouble awaited her, as she was informed by her agent, Meredith, that Bates said he would not comply with their agreement unless Meredith would pay a small debt which one J. M. Clark owed Bates, of about \$30, and afterwards he demanded as a condition to his compliance, that Meredith should pay certain of his own creditors. The complainant believing that she was under no moral or legal obligation to pay the debts named, and as they had no connection with the agreement between her and Bates, refused to comply with his unreasonable demand.

That prior to the filing of her bill, the complainant, through her agent, Meredith, tendered to Bates the full amount of his debt, together with the rent or interest due, according to the terms of their agreement, and demanded a deed from him, when the said Bates refused to accept the amount tendered, and to execute to her a quit claim deed for the lot purchased by him as aforesaid, but claims the property as his own, and denies having made the agreement heretofore set out.

b) The bill makes Bates a party defendant, and concludes with a prayer that he be compelled, upon the payment of his debt, interest and costs, to convey the property in dispute to complainant, by a quit claim deed, and for general relief.

c) The defendant, Moses D. Bates, filed his answer to the complainant's bill, in which he states that he has no knowledge of the private relations or domestic difficulties of the complainant. That he as assignee of Buchanan, brought suit and obtained judgment on the note as charged in the bill, that he sued out execution on his judgment, which was levied by the sheriff on the lot in controversy, and at the sale of the same he became the purchaser, and has obtained a deed for the said lot from the

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sheriff. He denies that he bought the lot for the complainant, or for any one, upon the terms set out in the bill, or upon any terms whatever; that he was willing to give Dr. Meredith time upon the debt, provided he could procure the written assent of Buchanan, the assignor of the note, but that assent could not be procured by Dr. Meredith, that he informed Meredith, and agreed with him to that effect, that if there was no competition he would buy in the property for the amount of his debt, and would relinquish the same to him or any person whom he desired, on payment of his claim and costs with ten per cent, and ten dollars a month for the rent of the house, if paid in any short time, that he has no recollection of having ever heard that Meredith had a mother-in-law, much less that Meredith was making this agreement as agent for complainant.

That the foregoing agreement was made prior to the first sale of the property, and but a day or two before said sale, and that he went to the sale with the intention to fulfil it; that when the sale took place, Meredith, in violation of the agreement, bid off the property himself, thereby putting an end to the agreement between them, that Meredith being unable to pay the purchase money, \$1010, procured an order of court for a re-sale of the property on a subsequent day, at which second sale the defendant became the purchaser for himself, and for no other person.

That after the first sale, hostile relations existed between him and Meredith, and no further intercourse took place between them, in reference to the subject—no new agreement was made by and between them, nor was there any overture on the part of Meredith to that effect.

That after defendant purchased the property, he learned that Meredith had induced the mechanic who built the house, not to file his lien, by pledging his honor that he should be paid, but had failed to pay him, whereby the lien was lost. Thereupon he respondent said to Dr. Meredith, "sir, I have bought your property; if you will pay the mechanic his bill, amounting to about \$700 or \$800, I still do not want your property." Dr. Meredith replied that he would attend to his own business, and declined his proposition. The offer being voluntary on his part is not binding.

That afterwards the defendant told Brady, the builder, whose lien had been lost as above stated, that he might have the rents of the houses on the lot until his debt was paid, and that Brady has accordingly rented them out.

The complainant, by an amendment to her original bill, sets out the articles of separation between herself and Samuel Rose, her husband,

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and states that ever since the separation she has done business and dealt as a *feeme-sole*, purchasing and selling real estate, without any interference on the part of said Samuel, that she has not seen her said husband for ten years last past, and when she heard from him last he was residing in the State of New York, that she does not know whether the said Samuel Rose be dead or now living, but that he is not a citizen of this State. The amended bill makes him a defendant.

An order of publication having been made against Samuel Rose, and proof of publication made, a decree *ni si* was taken against him.

The complainant then obtained leave further to amend her bill, and filed an amended bill, in which she charges that from the time of the agreement with the defendant Bates, as charged in the original bill, the said Bates has held possession of the property in dispute, and received and appropriated to his own use the rents and profits of the same.

That at the date of the sheriff's sale the property was under lease, at the annual rent of \$666,66, and before said lease expired, the lessee, without the knowledge of the complainant, surrendered the possession to the defendant Bates, who has since continued to lease the property and receive the rents therefor.

That on the 24th April, 1843, complainant made a demand in writing upon said Bates for the possession of the premises, which he refused to surrender to her; that in consequence of Bates' possession the complainant has been unable to make the necessary repairs to the property, whereby the same has become dilapidated, and sustained injury to the amount of \$500, besides the rents have fallen to \$600 per annum by reason of the premises being out of repair, which losses, in addition to the rents received by Bates, she prays may be decreed to her.

The defendant Bates filed his answer to the complainant's second amendment to her original bill, in which he states that the only possession which he has had of the premises, by his tenants or otherwise, has been of the one half of the house, the other half has been in the possession of the complainant, or Dr. Hugh Meredith, or persons claiming under them. He denies having received any portion of the rents, he is informed that some of the tenants have been notified by Meredith or complainant, not to pay the rent to the defendant, and he has thought proper to await the determination of this suit. That a portion of the rents have been, by agreement with Dr. Meredith or complainant, appropriated to the repair of the property in controversy; how much he is unable to state. That he does not know of the prior renting, nor the amount, but believes that the rent has been paid to Dr. Meredith or the

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complainant; that the whole property, owing to the want of repairs and lack of tenants, has not amounted in rents to one half of the sum specified. He insists on the statute of frauds, even should an agreement of the character charged in the bill, be established against him.

A general replication was filed to the answers of the defendant Bates and the cause was thereupon submitted to the court, upon the original bill, and the answer thereto, the amended bill and the answer thereto; the exhibits and testimony in the cause when the court dismissed the bill of complainant, and decreed the costs against her, whereupon she filed her motion to set aside the decree, and for a re-hearing of the cause, which was overruled, and she accepted and appealed to this court.

The complainant, to sustain her cause, and obtain a decree in accordance with the prayer of her bill, read her original bill and amendments, and then gave the following evidence:

1. Hugh Meredith was sworn to testify as a witness in the cause, when the defendant introduced James R. Garnett, who testified that in the fall of 1841, Dr. Hugh Meredith consulted the witness as to the manner of arranging his property, to save it from execution, until better times. Several modes were discussed between them, when finally it was concluded to mortgage to Mrs. Rose to secure a debt which he Meredith said he owed her, or to save it from sacrifice. He informed witness that he did not wish to defraud any one, only to save his property from sacrifice, until such time as he could sell it for a reasonable price; said something about Mrs. Rose having let him or his wife have some property, but witness' recollection of the conversation is not distinct.

The complainant then read a release in full from her to Hugh Meredith for the debt secured by the mortgage, taking the risk of obtaining her debt against him out of the property in controversy, whereupon the court permitted Hugh Meredith to testify.

Hugh Meredith testified that he had been acting as agent for complainant for many years, that the property in question was under execution in favor of defendant against him witness, and Tapscott. Witness was largely indebted to Mrs. Rose, and had made no preparation to discharge Bates' debt, because he had reason to believe from the statement of Bates that a sale would not be forced. Bates had frequently said to witness, that he only wished to have his debt made safe.

The first sale of the property took place on the 10th January, 1843, when witness saw Bates in Palmyra, just prior to the sale. Bates took witness up stairs in Thompson's store, his son-in-law, Thompson, went with us, and there proposed to buy in the property for witness, but wit-

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ness objected, stating that he would rather buy it in himself, as the property was mortgaged to his mother-in-law, Mrs. Rose, to secure her a debt which witness owed her; otherwise he would accede to the proposition. No agreement was then made. Witness went to the court house, believing that Bates would let him buy the property, and made a calculation of the amount of Bates' claim, during which the sheriff put up the property for sale, when Bates bid \$400 and the witness \$410, and so the bidding continued until finally the property was struck off to witness at \$1010. The sheriff informed witness that specie would be required, and that he would wait until the 13th for the money. Witness returned to Hannibal, and borrowed near \$500, which he was to have the use of until the first April, for an interest of \$50, with the liberty of returning the money in a few days without interest.

On the 12th January witness went back to Palmyra, and agreed on that night to meet his attorney and the attorney of Bates, and talk over the whole matter. He met them agreeable to promise. On the next morning he went to Mr. Bates, and got him to come to town with him witness, and during the morning the following agreement was made between them. Bates was to buy the property at sheriff's sale, and give a title bond, and Mrs. Rose was to pay \$10 per month and have possession, and redeem whenever she chose. At half past eleven o'clock the sheriff put up the property, and Bates bid it in at about \$365. Bates and witness then went into the office of his attorney, Mr. Buckner, when Bates requested Buckner to make out two papers—the lease to Mrs. Rose and the title bond. Buckner advised us not to pass any papers. Bates replied he was satisfied if witness was, and went off. Witness then told Buckner that if he gave that advice on account of any transactions which he supposed to exist between Mrs. Rose and the witness, it was unnecessary, because her claims against him could be substantiated anywhere. Witness went home and informed Mrs. Rose of what had been done; she was dissatisfied; he then wrote to Buckner to obtain the bond from Bates, provided it was not entirely inconsistent with his advice. Receiving no answer from Buckner, he went to Palmyra in a few days to see him, when Buckner still advised against passing any papers, assuring witness that as long as he or Wright, or any witness to the transaction lived, Mrs. Rose would be perfectly safe.

At the May term of the court 1842, witness came to Palmyra and tendered Bates \$220, which he refused to accept. In September 1842, during court week in Palmyra, he come up with money sufficient to pay the whole amount of Bates' debt, and the \$10 per month rent. It con-

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sisted of three \$100 bills, and the remainder in specie. Bates went with him to Buckner's office; took one of the notes out and returned, saying the money was good. He then told witness he had a note of Cark's for \$30, which witness must pay; witness would have acceded, but Bates soon started new difficulties. Afterwards, in same month, witness come to Palmyra in company with his brother, Campbell D. Meredith, since deceased, and in the name of Mrs. Rose, tendered to Bates the amount, in money, of his execution, debt, and \$10 per month from the date of the last sale—the amount being \$447. The money was all in silver coin; it was tendered at a grocery store in Palmyra; he refused to accept it, and told witness to go and pay his witness debts; several persons were but unknown to witness.

At the time of Bates' purchase, the property in dispute was leased to Hawkins & Son, and the Shacklefords, for \$666,66 per annum.

When witness come to the State in 1835, he owed Mrs. Rose a gross amount of \$10,000. This mouey he had collected for her and retained the use of; it was due her from various sources; some from the sale of her property in Pennsylvania, and some from rents and sale of property in South Carolina; in some of the property she only had a life estate, and some of it she owned absolutely.

Witness married the daughter of Mrs. Rose in 1833; her and her husband have not lived together since he became acquainted with her in 1825—saw Samuel Rose several times in Pennsylvania; he did not reside there but in New York. When witness first knew Mrs. Rose she transacted business in her own name, and has continued to do so ever since; she has instituted suits in Pennsylvania and South Carolina in her own name, and has been sued in the name of Ann Rose. Witness has learned that Samuel Rose sold a pretended claim to some property of Mrs. Rose, in Pennsylvania, to his nephew of the same name; has not heard definitely from Samuel Rose for twelve or fourteen years; if alive, he is about sixty-five years of age. Mrs. Rose is about fifty-five years old.

CROSS EXAMINED.—Witness' agency for Mrs. Rose commenced gradually without any written authority; on one occasion, when he went to South Carolina, and received \$15,000 for her, he had a power of attorney, but does not know where it now is. The money was due for rents.

By or before 1836, witness had received from Mrs. Rose from eight to \$10,000, principal and interest. Mrs. Rose has never given his wife any thing by way of advancement, but has been in the habit of giving her small amounts and presents. The farm on which Mrs. Rose lived in

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Pennsylvania, was to be his wife's at the death of her mother. His accounts with Mrs. Rose have always been loosely kept, in small memorandum books. When witness went to Pennsylvania, in 1837 or 1838, he gave Mrs. Rose bonds to a large amount, that she might have her money in case of his death. He was then unembarrassed.

Witness never had the conversation with Garnett to which Garnett deposed. He never said to Dr. Jerman or any one else, that he did not owe Mrs. Rose a large amount; any statements to that effect are false.

In 1838 when he gave Mrs. Rose the bonds, she at first declined to take them, but at his request she afterwards took them; when he returned she gave him the bonds to keep as he kept all her papers. Mrs. Rose did not wish her property to come to Rose's hands, and was well satisfied that he should use it. Rose frequently tried to get it.

He is certain that at the second sale, Bates did not agree to purchase for him, but for Mrs. Rose. He did not think that Bates would bid against him at the first sale; he thinks the property worth \$5,000 in ordinary times; he feared Bates all the time, but felt that he and Mrs. Rose were in his power, and did the best he could; thought the arrangement offered by Bates was better than keeping Eastman's money, which he had borrowed on his terms. At the first sale there was no quarrel between him and Bates.

There was a judgment older than the mortgage, in favor of Richard Boyce, against Tapscott and Meredith. Wright, his attorney, said Bates could be relied upon, and if he died, there would be no danger as long as any witness to the transaction lived.

After the last sale, witness expected to get money from the east with which to pay Bates; Mr. Buckner, he understood, was the attorney or agent for Bates. Boyce's debt, (about \$100,) has been paid. Mrs. Rose is easily influenced, and has generally been under his influence. Bates had promised from time to time to wait on witness, but always deceived him. First he said he would not sue; after the judgment he promised to wait a year, but he issued execution, alleging that Buchanan required it. At the first sale witness hoped for indulgence, but was suspicious of Bates, and therefore feared for him to bid on the property; thought that he could bid in the property himself and secure Bates, as he had said all he wanted was his money. Being enquired of how he could secure Bates by buying in the property, when there were a number of judgments against him, he answered that he was no lawyer, and knew but little about the effect of such a purchase.

At the second sale, from the statements of Wright and Buckner, that

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the honor of Bates might be relied on, witness agreed that Bates might purchase in the property. Being asked why he did not take the money borrowed of Eastman and pay off Bates' debt, witness answered that he was told by his lawyer that if he paid Bates, the surplus of his bid would be ordered into court for distribution among his creditors.

2. A mortgage from Hugh Meredith to Ann Rose, dated the 7th December, 1841, conveying to her the property in dispute, to secure the payment of \$5,000.

3. A deed from N. B. Tapscott and wife to Hugh Meredith, dated the 4th December, 1840, conveying all their interest and title to the lot in dispute, to said Meredith.

4. The judgment and execution in favor of Moses D. Bates, against N. B. Tapscott and Hugh Meredith, under which the sale by the sheriff was had, with the sheriff's return on the execution.

5. The sheriff's deed to Bates under the sale above named. The judgment, execution, and sheriff's deed, were read, by agreement, from the records and files in the clerk's office.

6. The testimony of Isaac Holt, who was present at the second sale of the property by the sheriff; he heard a conversation between Moses D. Bates and Hugh Meredith, in which it was agreed that Bates was to buy in the property, and Meredith was to have time to redeem it, upon paying the amount which Bates bid with interest. Mr. Buckner was present or in the office during the conversation. Witness was not present at the first sale; he is certain that Bates bid in the property at the sale at which he was present; he intended to buy in the property to secure himself in a security debt which he promised to see paid by Tapscott and Meredith; he was satisfied with the arrangement between Bates and Meredith, and did not bid for the property; he did not hear Mrs. Rose's name mentioned at the time; he was listening, they did not know it; he did not hear all that was said between them, but enough to satisfy him of the arrangement. The conversation was before the sale; don't recollect of any thing being said about passing of papers. He is certain that the conversation above alluded to was on the morning of the second sale, because he was induced to come up by hearing of the purchase by Dr. Meredith at the first sale, and his failure to pay the money. At the sale at which he was present Bates bid off the property at \$365 or \$366.

7. Deposition of H. Peake, who states that at the term of the Marion circuit court, when the brick house in Hannibal, the property of Tapscott and Meredith was sold, and immediately thereafter Dr. Meredith

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and M. D. Bates came into the portico of the court house where he was standing, when Dr. Meredith informed him that Mr. Bates had purchased the house for the amount of his execution, and had agreed that Meredith m'ght redeem it, to which Mr. Bates assented, saying that he was to have good interest for his money, but did not say what interest.

8. Deposition of Z. G. Draper, who states that he was present at the sale of the property in dispute—the second sale. Previous to the sale, at the request of Dr. Meredith, he had spoken with Mr. Bates, endeavoring to ascertain if an arrangement for further time, for the payment of the debt, could be made; but on the morning of the sale did not know whether an arrangement had been made or not, until after the sheriff had proclaimed the sale of "Hannibal property," when he started from the door of the clerk's office toward where the sheriff stood; before reaching the place he met Bates, who said there is an arrangement about this property. I am to purchase it and give an arrangement or paper on the payment; whether arrangement or paper was the word used by Bates, he is not certain, but his understanding was that it was to be an obligation for the reconveyance of the property on the payment of Bates' claim. He intended at the moment of the proclamation by the sheriff of "Hannibal property for sale" to bid for the property, and purchase it if it went for \$500 or \$600; but upon the annunciation of Mr. Bates that an arrangement had been made between him and Dr. Meredith, the witness declined bidding, and returned to the clerk's office on other business. Mr. Bates has since informed witness that he purchased the property referred to, at the time spoken of by him. Witness is certain that this was the second sale, for at the first Dr. Meredith was the purchaser, but it was said he was unable to pay the amount bid.

CROSS EXAMINED.—He thinks the conversation had with Mr. Bates and the sale spoken of, took place on Tuesday; but of the precise day he cannot be positive. From the conversation of Mr. Bates, who informed me that Dr. Meredith had previously bid off the property, but was unable to comply with the terms of the sale, and the statement of both Bates and Meredith that Bates bought at the sale of which I have spoken, I am satisfied the remarks of Mr. Bates heretofore detailed concerning an arrangement, was just prior to the second sale.

9. The testimony of Jamison F. Hawkins, who states that he was tenant in possession of one part of the house at the time of the sale and purchase by Bates; that after the sale Dr. Meredith called on him for a settlement of the rent, which he declined paying until he saw Mr. Bates;

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that he saw Bates, who told him to pay Mrs. Rose or Meredith, and that he did so.

10. The lease to Hawkins and Son, and G. H. & R. C. Shackleford, dated 9th January, 1840, of the house in question, for three years, at \$666,66 per year.

11. It was admitted on the trial that Mrs. Rose paid the taxes on the property in question, and that the same was assessed to her in 1842, and since.

12. Samuel J. Harrison testified that in January, 1843, he rented one half of the house from Mr. Brady, as agent for Moses D. Bates, at \$100 for six months, and occupied it until the next spring, paying at the same rate; a portion of the rent was expended in repairs; paid the rent to Brady as agent for Bates, until notified by Mrs. Rose not to pay, since which time no rent has been paid to any one.

13. T. R. Sehn testified that he had occupied the corner room as sub-tenant of Bates, and also rented the room of Mr. McDonald as the agent of Bates, at \$175; continued in possession about nine months; paid the rent to McDonald.

14. W. H. Davidson testified that he rented the corner room from the agent of Bates, at \$175 per annum; he has expended upwards of \$40 in repairs by consent of both parties.

15. M. McDonald testified that the firm of Blain and Green occupied the corner portion of the property in question for one year, and the rent was paid by them.

16. James Brady testified that shortly after Bates purchased the property, the Shackleford's, who were in possession under a lease from Tapscott and Meredith, surrendered the corner half of the house to Bates, and Bates appointed him his agent; that as such agent he leased to Harrison at \$200 per year, and received a part of the rent which he applied to an account between him and Bates; that Bates subsequently appointed McDonald his agent, who has continued to rent the property since. The corner part of the house has been worth from \$175 to \$200 per year, and one year rented for \$275; the other part of the house has never been in Bates' possession.

17. Articles of separation between Samuel Rose and Ann Rose his wife.

18. Lease from Ann Rose to John Duncan for certain property in South Carolina.

19. Deed from the master in equity to Julius Pringle, in trust for Ann Duncan, afterwards Rose.

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20. Deed from Wm. Fair to same. These deeds conveyed certain real estate in the State of South Carolina.

21. Deed from James Buring to Ann Rose, conveying certain real estate in Pennsylvania.

The defendant's evidence consisted of

1. The testimony of Buckner, who testified that he cannot state certainly the time he held the first conversation with Dr. Meredith, but thinks it was prior to the first sale. Dr. Meredith approached him on the subject of Mr. Bates purchasing in the property ; told him that Bates had agreed so to do, and was consulting with Uriel Wright and witness how it should be done ; Wright as the attorney of Meredith, and witness as attorney of Bates. Meredith spoke several times of getting from Bates a writing to reconvey on payment of his debt ; to this, as Bates' attorney, he objected, for the reason that it would vitiate the sale, and be no more than a mortgage, and not so good as his lien under the judgment, and he told Meredith that so long as he or Wright lived there could be no difficulty ; he is of the impression that the above conversation took place previous to the first sale. Sometime after the second sale, on his way home, he was overtaken by Dr. Meredith, who told him that Bates refused to let the land be redeemed ; he was at that time under the impression that Bates would let him redeem, and so told Meredith, and also told Meredith that he would see Bates on the subject. He did afterwards see Bates, who positively refused, saying he was under no obligation to Meredith, as he had bid against him, and thereby set aside all understanding between them. In the same conversation, or a short time thereafter, Bates said Meredith might redeem if he would pay off a note which he held against Clark, saying all was Hannibal business, and he would not lose by Hannibal.

He was not present at either sale, though he cannot speak with entire certainty ; he heard a conversation between Meredith and Bates in front of the court house, but thinks it was at the term of the court after the sale took place. Meredith contended that Mrs. Rose had a right to redeem, whilst Bates denied her right, and asserted that the agreement to that effect only extended to the first sale. He does not recollect of the parties speaking to him to write any papers after the second sale ; he received a number of letters from Dr. Meredith, all of which were returned to him except one which was lost. He does not recollect the purport of the letters, but they were on the subject above spoken of, and some other business. He does not recollect of ever having applied to Bates for a title bond for Meredith, nor does he believe he ever did.

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as it was his advice to Bates not to give one. He was of opinion that Bates would let Meredith redeem, until otherwise informed by Bates; cannot state whether or not Meredith was present when he conversed with Bates on the subject. In the conversation had between Wright, Meredith and witness, the name of Mrs. Ann Rose was mentioned frequently in connection with the business, but cannot now say exactly how.

The foregoing constituted the evidence before the court below upon which the decree was rendered.

The testimony on a preliminary point in this case, shows that the complainant, Ann Rose, prior to her marriage with Samuel Rose, was possessed of a large estate, held in trust for her by trustees; that some time after her marriage with Samuel Rose, a separation took place between them, and articles of separation were executed on the 19th March 1824, between Samuel Rose of the one part, and John Duncan the father of Mrs. Rose of the other part, by which the said Samuel relinquished and renounced all his *marital* rights, and agreed that thereafter the said Ann might exercise all the rights of a *feme-sole* trader, by the purchase and sale of real estate, &c., &c., free from the control, hindrance, &c., of the said Samuel, &c., whilst Duncan undertook on his part to save harmless the said Samuel from all debts, liabilities &c., of his wife.

It further appears that a short time after the separation, Mrs. Rose removed to the State of Pennsylvania, and with the remnant of her large estate, still sufficient with economy and prudent management to afford her a support, purchased property there, where she continued to reside until her removal to this State in 1835, with her son-in-law Dr. Meredith, who had married her only child; that before and after Mrs. Rose's removal to Missouri, she had loaned Dr. Meredith about \$10,000, constituting nearly the whole of what was then left to her.

That Meredith continued to use her money, supporting her in the meantime, until he became embarrassed in trade, when to secure a portion of the amount due her, he executed, on the 7th December 1841, to her a mortgage on the property in controversy, estimated by him at the time to be worth about \$5,000.

That during all this time, from the year 1824 up to the hearing of this cause in March 1848, Samuel Rose has not appeared to reclaim or assert his rights, nor has he been heard of for the last ten years, when he was sojourning in the State of New York.

Now as a general rule, unquestionably Mrs. Rose could not maintain a suit in her own name, but the suit would have to be brought in the name of

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the husband, Samuel Rose, notwithstanding the separation. Yet to this general rule there are exceptions, as where the husband was exiled; then the wife was permitted to sue in her own name. 1 Coke Lit., 132 A. And the same reason applying where the husband has abjured the realm, the wife was permitted to sue for her dower as though she were a widow. She may maintain in such case trespass. 2 Moore, 851. She may sue for jointure, and may also be sued as a *feme-sole*. Roll. R. 188; she may also make her will. 2 Vern 614; and in all things act as if her husband were dead, the necessity of the case requiring that she should have such a power. Indeed, banishment and abjuration have been uniformly held a civil death of the husband, and removes the disabilities of coverture, restoring the wife to all the rights and liabilities of a *feme covert*, and even though the banishment be for a limited time, and that time had expired, unless the husband had returned and assumed his marital rights. 3 P. Will, 37. So, also, have the facts and circumstances which should be considered as proof of having abjured the realm, been liberally regarded, as where the husband resided abroad, leaving his wife to trade and gain credit as a *feme-sole*. This has been adjudged sufficient to render her liable as a *feme-sole*. 1 B. & P., 357.

The wife of an alien enemy has also been held liable to suits, as the husband was not amenable to the process of the court. 1 Ld. Ray 147.

Other cases might be cited, but these are sufficient to show some of the exceptions to the general rule of the wife's disability to sue and be sued, as recognized by the English courts. These cases were of course decided upon the general law, without reference to the custom of London.

The same exceptions recognized by the English courts, have received the sanction of the courts in this country, where the question has been adjudicated.

The case of Gregory vs. Paul, 15 Mass. R. 31, was where a bequest had been made to the plaintiff, which the executor refused to pay. Suit was brought, and the defence was that the plaintiff was a *feme covert*, having a husband residing in England. She replied, alleging that her husband had deserted her, and departed from the place of her abode, without leaving her any means of necessary provision and support, and from that time had not corresponded with nor returned to her, and that, during all that time, she hath lived apart from her husband, and maintained herself as a single woman, and during the five years last past, and upwards, she had resided and lived in Massachusetts, and still lives therein, and her husband is a native of Great Britain, and from his birth

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has lived within the said kingdom, and has never been in the State of Massachusetts, or within any of the United States.

To this replication the defendant demurred.

After an examination of the english authorities on the subject, the court say : The case at bar comes within the spirit of the rule of the common law, founded in reason and necessity, in cases of exile and abjuration. The plaintiff has been domiciled here for many years as a *feme-sole*. Her husband is an alien and never was, and is not expected ever to be, in this country. He abandoned his wife, and for a great number of years made no provision for her support in his own country, but he has compelled his wife to abjure it. This should not make the case better or worse for her ; if the husband had been a native citizen, and had deserted his wife, and became a subject of a foreign State, the law would be clear for her upon the adjudged cases. We are satisfied that the plaintiff may acquire property, and be permitted to sue, and is liable to be sued as a *feme-sole*, and that her release would be a valid discharge for the judgment she may recover.

The case of Abbott vs. Baily, 6 Pick. R. 89, only differs from the other case in this, that the husband of the plaintiff resided at the time in the State of New Hampshire. The court held, however, that so far as the question of the wife's right to sue was involved, the residence of the husband in another State of the confederacy was equivalent to a residence in Canada or Novia Scotia ; that the husband was as much beyond the jurisdiction of that court residing in New Hampshire, as if he resided in a foreign government ; that proximity can make no difference for the line of jurisdiction is, in a political point, an impassable barrier.

The exceptions, though dictated by necessity, are founded in wisdom and humanity, for miserable indeed would be the situation of these unfortunate women, whose husbands have renounced their society and country, if the disabilities of coverture should be applied to them during the continuance of such desertion. If that were the case, they could obtain no credit on account of their husbands, for no process could reach him, and they could not recover for a trespass upon their persons or property, or for the labor of their hands. They would be left the wretched dependants upon charity, or driven to the commission of crimes, to obtain a precarious support.

Some reliance was seemingly placed upon the contract or agreement of separation, executed by Samuel Rose and John Duncan, by which Rose undertook to confer on his wife the power of purchasing and selling real estate, of suing and being sued &c. This contract was most

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probably entered into under a misapprehension of the law. In South Carolina, where this contract was made, the custom of London has been adopted, by which a husband can, by articles of agreement, constitute his wife a *feme-sole* trader, by which she become solely liable for her contracts, and may sue in her own name whenever such becomes necessary for the maintainance of her rights. But this privilege has been confined in that country, and perhaps in South Carolina, to the trade of merchandizing, and not to the acquisition or disposition of real estate. We presume it was with reference to this custom that the contract was made, but the terms extend beyond those recognized by the custom, and are inoperative that far at least.

But it is not now important to enquire how this is, as we hold that the complainant clearly had the right, by the rules of the common law, and under the attendant circumstances, to bring her action without joining her husband.

We shall now investigate the charge made by the complainant in her bill, that Dr. Meredith as her agent, acting for and on her behalf, made an agreement with Moses D. Bates, the defendant, prior to the second sale, that he Bates should bid off the property in controversy at the second sale, and that she the complainant should have the right of redeeming the same, at any subsequent time, by paying to Bates the amount of his debt and interest thereon, with ten dollars per month in addition thereto, and that upon such payment being made by the complainant, the defendant was to convey the property purchased to the complainant, by deed of quit claim.

The answer of Moses D. Bates denies that any agreement, whatever, was made in reference to the second sale, but alleges that an agreement to the same effect was made prior to the first sale, and that the defendant attended that sale, with the *bona fide* intention of carrying the agreement into effect, on his part, but was prevented from doing so by Dr. Meredith, who, in disregard of the agreement entered into between them, attended the sale himself, and did not only bid for but purchase the property at a sum greatly exceeding the amount of the defendant's debt. That this conduct of Meredith was a renunciation of the agreement on his part, and absolved the defendant from all obligations thereafter; that no new agreement was made in reference to the second sale at which he purchased, but that the purchase was made by him exclusively for his own benefit, and upon no trust or understanding, open or secret, for any other person.

The testimony of Dr. Meredith, the agent, is full, clear and explicit,

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in support of the charge in the bill, doubtless the bill was framed upon his statement of the agreement between himself and Mr. Bates. The defendant objected to the competency of Meredith, as a witness, and to sustain his objection introduced a witness whose evidence went to impeach the credibility of Meredith. Whether a witness be competent or not, depends in no wise upon his credibility. They are distinct grounds of objection, and the establishment of the latter does not operate to exclude the witness from testifying, for the triers of facts have the power of exclusion in such cases. But, if the objection to Meredith testifying was based upon his assumed fraudulent conveyance to Mrs. Rose, the objection was equally untenable, for fraudulent conduct on the part of the witness does not render him incompetent to testify, and as between Meredith and Mrs. Rose the conveyance would be sufficient to divest him of title. The only ground of objection was that of interest, and that objection was removed by the release executed by Mrs. Rose to Dr. Meredith.

Let us then examine the other evidence in the cause, and ascertain how far it corroborates and sustains that of Dr. Meredith.

The answer admits an agreement as before stated. Mr. Holt proves that an agreement was made between Meredith and Bates, on the morning of the second sale, and just prior thereto, in which it was agreed that Bates was to bid off the property and give Meredith time to redeem. He was not at the first sale, and consequently the conversation which he details could not have taken place at the first sale. Mr. Holt had learned prior to the day of the second sale that Meredith had bid off the property, but was unable to comply with the terms of the sale, and consequently the property would have to be re-sold. He being a creditor of Meredith, was induced to go to Palmyra on the day of the second sale, intending to purchase if the property went at a great sacrifice.

Hearing the arrangement made between Bates and Meredith, he was satisfied that no sacrifice of the property would then take place, and left without bidding for the property. Besides, he says that at the sale which took place on the day of the convention between Bates and Meredith, Bates was the purchaser at \$365. Now, at the first sale Bates was not the purchaser, nor did the property sell for \$365, but for \$1010. This, then, fixes the time of the conversation to the morning of the second sale.

Dr. Peak also was present at the second sale, and immediately thereafter, Bates and Meredith came to where he was standing, and Meredith remarked to him that Mr. Bates had purchased the house for the amount

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of the execution, and had agreed that he might redeem it, to which Bates assented, saying that he was to have a good interest on his money.

The amount of the execution was \$365, and the *good interest* is ascertained by reference to the bill and answer, both of which state that it was to be ten per cent interest on the debt, and ten dollars per month rent, equal to forty per cent.

Mr. Draper was also present at the second sale, and had acted as the friend of Dr. Meredith in endeavoring to obtain indulgence from Mr. Bates, but not knowing whether an arrangement had been made, and the sheriff having proclaimed the sale of Hannibal property, he started to go where the sale was to take place, and met Mr. Bates, who informed him that an arrangement had been made about this property, by which he, Bates, was to buy in the property and give Meredith an obligation for the re-conveyance when the money was paid. Mr. Draper intended purchasing provided the property did not sell for more than \$500 or \$600, but on receiving the information from Mr. Bates that an arrangement had been made, he declined bidding for the property. Mr. Draper was only present at one sale, and supposes it to have been the second, because Mr. Bates informed him that at the first sale Meredith bid off the property, but was unable to pay the amount of his bid.

Here are the witnesses whose testimony corroborates and sustains that of Dr. Meredith in all of its material points, and establishes fully the charge made in the bill. We are then led to conclude, indeed there can be no reasonable doubt, that an agreement was made between Bates and Meredith, on the morning of the second sale, by which the former was to bid off the property under his execution sale, and give to the latter time to pay the money, upon the payment of which, the property was to be conveyed to the complainant.

But if there was no agreement, in fact, between the parties, of the character charged in the bill, yet a court would be disinclined to ratify a sale under the circumstances of this case. Here were at least two individuals attending the sale, for the purpose of bidding for the property, and were willing to give greatly more than it sold for, who were induced by the statements of Mr. Bates, not to bid, whereby he was enabled to buy it at a great sacrifice.

The interest of execution debtors, and the fairness of legal sales, both demand the supervisory control of the courts, for every day's observation admonishes us of the power which a creditor has over an embarrassed debtor, and the facility with which he can oppress and wrong him.

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The agreement being established, Bates relies upon the statute of frauds to enable him to retain the property thus acquired. But this will not avail him in the present case, it being the peculiar province of a court of chancery to enforce contracts and agreements of this character. The agreement was not that Bates should convey real estate, the legal title to which was then in him, without a writing evidencing the agreement, but an agreement that Bates should bid in the property of Dr. Meredith, on which the complainant held a mortgage, and hold the same in trust for her benefit, and to be re-conveyed on the payment of his debt, upon the tender to Bates of the amount due him under the agreement, he should, in equity and good conscience, have conveyed the property to Mrs. Rose, and the statute never was designed to aid a party in committing a fraud, but was intended to prevent frauds, and consequently it cannot be invoked to the aid of the defendant.

Wherefore, for the foregoing reasons, the decree of the circuit court is reversed and set aside, the other judges concurring herein.

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1. Justices of the peace have jurisdiction over actions of *trover* where the damage claimed does not exceed fifty dollars.
2. An *administrator* can maintain an action of trover in every case where the deceased might have done in his life time.

APPEAL FROM MONROE CIRCUIT COURT.

McBRIDE, judge, delivered the opinion of the court.

Harrison Smith as administrator of Thomas Grove, brought an action of trover before a justice of the peace against Isaac Grove, "for one bay horse, worth \$20, and fifty head of stock hogs, worth \$30," making the sum of \$50. A verdict and judgment was obtained before the Justice from which the defendant appealed to the circuit court, where, on motion of the defendant, the judgment of the justice was reversed and the

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cause dismissed. From this judgment the plaintiff has appealed to this court.

By referring to the motion filed in the circuit court by the defendant's attorneys, for a dismissal of the case, we are led to conclude that the court dismissed the case under the belief that the justice of the peace had not jurisdiction.

The statute regulating the "jurisdiction of justices courts" provides by the third sub-division of the third section R. C. 1845, p. 635, that justices of the peace and the circuit courts shall have concurrent jurisdiction over "all actions of trespass and trespass on the case for injuries to persons, or to personal or real property, wherein the damages claimed shall exceed twenty dollars, and shall not exceed fifty dollars."

The action brought by the administrator in this instance must be regarded as an action of *trover*; for the statement filed before the justice of the peace, charges the defendant with having "taken the property" above specified "and converted the same to his own use." The action of trover was, in its origin, an action of trespass on the case for the recovery of damages against a person who had *found* goods, and refused to deliver them on demand to the owner, but *converted* them to his own use, from which word *finding* (*trover*) the remedy is called an action of trover. Bl. Com.; 1 Chitty's Pleadings.

The action of trover may now be brought against any person who has in possession, by any means whatever, the personal property of another, and sold or used the same without the consent of the owner, or refuses to deliver the same when demanded. The injury lies in the *conversion* and *deprivation* of the plaintiff's property, and in this consists the gist of the action, 1 Chitty's pl. 167. Bacon's Ab. title trover.

Any person having a special or general property in the thing converted, may maintain an action of trover to recover damages for the withholding of the same from him. And hence an executor or administrator, who represents the testator or intestate, may bring the action, in perhaps every case, where the deceased might have done in his life time, for they acquire by relation, a general property in whatever belonged to the deceased at his death.

We are of opinion therefore. 1st, That the justice of the peace had jurisdiction, and 2d, That the administrator had a right to sue in this form of action.

Judgment reversed and the cause remanded for trial in the circuit court.

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1. Upon an application for a divorce where both parties are found guilty of any of the enumerated offenses for which a divorce may be granted, the court should dismiss the bill.

APPEAL FROM CLINTON CIRCUIT COURT.

STRINGFELLOW for appellant.

The acts charged by respondent and found by the court as committed by complainant shew that complainant is not an innocent and injured party.

By the cruel and inhuman treatment of the wife the husband became guilty of that which entitled the wife to a divorce, and having thus lost all right to hold her bound by her marriage vows could not be injured by her adultery. He having violated the contract has no right to complain of its breach. 9 Mo. R. 539; 14 Wend. 644; 3 Eng. Ec. R. 303, 338; 7 do. 380.

LEONARD for appellee.

1st. The fact of the husband's cruelty to the wife is not preserved in the record so as to raise the question whether it can be recriminated against the husband's claim for a divorce founded on her adultery.

2d. If the question can be made on the record, the husband's cruelty is no bar to his title to a divorce founded on the wife's adultery.

1st. The English ecclesiastical law of divorce is no part of the law of this State. Our law of divorce is created and limited by the express enactments of the legislature, and therefore the doctrine of compensation of offences is not in force here as a part of the law of the land.

Bettis vs. Bettis, Hopk. (New York) Chan. Rep. 557; Ryan vs. Ryan, 9 Mo. Rep. 539.

2d. The 1st section of the statute (Rev. statutes of 1845 p. 426) declares and defines the causes of divorce, while the seventh section specifies the causes which bar a divorce.

The legislature have expressly provided that adultery may be recriminated as a bar and it is now proposed that the courts shall provide that cruelty and all the other matrimonial offences that constitute a ground of divorce may be also recriminated. The express permission of the legislature to recriminate one offence is an exclusion of the right to recriminate any other. The words "innocent and injured party" in the first section of the act, were employed on account of the peculiar phraseology of the section, to designate which of the two parties were entitled to the divorce, and not to introduce into our law the English doctrine of compensation of offences which was partially introduced and limited in the 7th section of the act.

Revised statutes of Illinois 197 sec. 4; Rev. statutes of Arkansas 334 sec. 8.

3d. If the English law on this subject be in force here, and come either as part of the common law, or with the statute, as a rule to govern us in its construction, our position is still maintained, and even strengthened. By that law the husband's cruelty cannot be recriminated by the wife against her own adultery. Both offenses must be the same, the one complained of and the one with which it is to be compensated. In the language of the English ecclesiastical courts, both parties must be in "*eodem delicto*." They are then fit associates for each other and the courts will not interfere.

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Chambers *vs.* Chambers, 1 Hay, Con. Rep. 439, reported in 4 Eng. Con. Ecl. Rep. 451.
Eldred *vs.* Eldred 2 Curtein 376, (reported in 7 Eng. Ecl. Rep. Cen. 147.)

Forster *vs.* Forster, 1 Hay, Con. Rep. 144. Reported in 4 Eng. Con. Ecl. Rep. 360.
Johnson *vs.* Johnson, 4 Paige's Rep. 460.

same 14 Wend. Rep. 644.

4th. The facts stated in the answer admitting them all to have been proved as alleged do not amount either to "such cruel and barbarous treatment as to endanger the life," or "such indignities to the person as rendered her condition intolerable," within the meaning of our statutes.

McBRIDE judge delivered the opinion of the court.

Martin M. Nagel brought his petition for a divorce in the Clinton circuit court, against his wife Parthena Nagel, in which he charges her with adultery and cruel treatment.

The defendant filed her answer denying the charges made against her in the petition, and makes her answer a cross-bill against the plaintiff, charging him with cruelty and inhuman conduct toward her, and prays for a divorce from her husband.

The cause was heard by the court on the bill, answer and proofs, and the court decreed against the wife. She then moved for a new trial, which having been refused, she excepted and has brought the case to this court by appeal.

The bill of exceptions states that "it is admitted that the evidence sustained the plaintiff's allegations of adultery and also the defendant's allegation of cruel and inhuman treatment, and of such indignities towards the person of the defendant as rendered her condition intolerable."

The facts found by the court for each of the parties, are, under our statute, causes for a divorce; but each party having been found guilty of a breach of their marriage contract, the question arises whether a decree should be rendered for either or both of them.

This question must be decided upon our statute, which embraces and regulates the whole subject, as was stated by this court in the case of Ryan *vs.* Ryan, 9 Mo. R. 539. The finding of the circuit court, in that case, was similar to the finding in this case; for there the court found the defendant had been addicted to habitual drunkenness for the space of two years and more, and that the complainant had been guilty of adultery; and thereupon dismissed the bill of the complainant. This court sustained the judgment of the circuit court.

The first section of our statute regulating the subject of divorces, R. C. 1845, p. 426, enumerates the several causes for which a divorce may

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be obtained; amongst others that of adultery is named, as also, cruel and inhuman conduct, and declares that, for the commission of any of the acts specified, the *injured and innocent party* may obtain a divorce from the bonds of matrimony.

It is insisted that the terms *injured and innocent party* as used in the first section, were employed on account of the peculiar phraseology of that section, to designate which of the parties were entitled to a divorce. But the same terms occur in the third section, which provides for the filing of the answer to the bill, and authorizes the defendant to set forth and charge in the answer, that the complainant has been guilty of some of the acts specified in the first section, and pray the court for such cause to grant a divorce to said defendant, and upon the hearing "if the court shall be satisfied that the defendant is the *injured party*, the court shall enter a decree divorcing the said defendant from the said complainant, as prayed in the answer." And by the 8th section, it is provided that in all cases of divorce from the bonds of matrimony, the "*guilty party*" shall forfeit all rights and claims, under and by virtue of the marriage, nor shall the *guilty party* be allowed to marry again by reason of the divorce, under five years thereafter, unless otherwise expressed in the decree of the court; and in all cases of *ex parte* proceedings, the court shall, before it grants a divorce, require proof of the good conduct of the petitioner, and be satisfied that he or she is an *innocent and injured party*.

Thus it is seen that a party applying for a divorce must show that he or she is the *innocent and injured party*; otherwise the court should not grant the divorce. And the principle seems to pervade all the sections on this branch of the subject, except the seventh.

By the seventh section it is enacted that "if it shall appear to the court that the adultery or other injury or offence complained of, shall have been occasioned by the collusion of the parties, or done with the intention of procuring a divorce, or that the complainant was consenting thereto, or that both parties have been guilty of adultery, then no divorce shall be decreed."

Why the draftsman of this section should have used language in the forepart of this section sufficiently comprehensive to embrace all causes of divorce specified in the first section, and then conclude by restricting the prohibition to adultery alone, it is difficult to conceive. Any and all the other causes enumerated in the first section of the act, are equally effective in entitling a party complaining, to obtain a divorce. It cannot, with reference to the rights of the injured party, be said that

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adultery is a more heinous offence, or one of greater moral turpitude, than others enumerated in the act, for the effect of each is the same, as they severally entitle the party injured to a divorce.

We have examined the history of this law in our State and find that the first act was passed in the year 1807; then a supplemental act passed in 1817; neither of which contain the provision under consideration; but a discretion was given to the courts to hear all applications under the act, and to determine the same as to law and justice shall appertain, by either dismissing the petition or libel, or sentencing and decreeing a divorce. In the revision of 1825, p. 330, the provisions of the 7th sec. of the act of 1845 was first introduced into the statute of this State. At that time the causes which would entitle a party to a divorce, were impotency, a previous existing marriage, adultery and desertion. The provision at that time could only operate practically upon two of the causes of divorce, to-wit, adultery and desertion. If, therefore, both parties have been guilty of adultery, no divorce should be granted, and if the desertion complained of is collusive or done with the intention of procuring a divorce, or the complainant consented thereto, then no divorce should be granted. So that where both parties are guilty either in fact or in contemplation of law, no divorce is to be granted. Subsequent to the revision of 1825, other causes of divorce have been created by statutory enactment, until in 1845 we find no less than nine distinct causes set out in the statute, for which a divorce may be granted; and still the fourth section of the act of 1825 is retained in the very language in which it was first incorporated in the law.

Now it is contended that the express permission of the legislature to recriminate one offence (as in the seventh section) is an exclusion of the right to recriminate any other. We feel the force of this difficulty in the case, and yet we must make it an exception to the general rule laid down, or sacrifice to its operation what we consider to be a principle pervading the whole act. The whole act evidently contemplates the innocence of the party obtaining a divorce. With what propriety could the court divorce a husband from his wife because of desertion on her part, when she had been driven to abandon her home because of the cruel and barbarous treatment of the husband? Or how shall the court determine which is the *innocent and injured party* where the evidence establishes the fact that the wife has been addicted to habitual drunkenness for the space of two years and that the husband has been guilty of adultery? Which party has a right to appeal to the court to

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set aside and vacate the marriage contract, when both have been guilty of a breach thereof?

If A brings a bill for a divorce against B and on the trial it should be established by evidence that A was the guilty party, the court would not grant A the divorce prayed for. Here the husband brought his bill for a divorce, and the wife makes her answer a cross-bill against the husband, and the court find, upon the hearing of the two complaints, that both parties are guilty; which then is the *innocent and injured party*, and entitled under the statute to a divorce?

Upon consideration of the whole statute, we are of opinion, that where both parties are found guilty of any of the enumerated offences for which a divorce may be granted, the court should dismiss the bill.

The judgment of the circuit court will therefore be reversed and the bill dismissed.

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1. The discovery of new evidence relating to a point, tried in the issue, and upon which evidence was given, is merely cumulative and not good ground for a new trial.

APPEAL FROM RAY CIRCUIT COURT:

Wood & Dunn, for appellants.

- 1st. The plaintiff below appellee here seeks to recover for money had and received, and the defendant below appellant here may rely upon every thing which shows that the plaintiff *ex equo et bono*, is not entitled to recover. Comyn on Contracts, 266.
 - 2d. The moral obligation created by the defendant's advancing money to the husband of the plaintiff to save his property from execution, upon his pledging this money to re-imburse him, is a sufficient consideration to support her promise that he might retain this money in payment of the money so advanced. Wheaton's Selwyn, vol. 1, 42.
 - 3d. The trouble and expense incurred by the defendant in having the pension papers made out and forwarded, added to his equitable right to the money, is a consideration which renders her promise that he might retain it to pay his debt obligatory upon her. Chitty on Contracts, 32.
 - 4th. The defendant in his affidavit of partly discovered evidence disposes a new and man-

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terial fact which came to light since the trial, and which he did not know, and had not the means of proving before the court sitting as a jury, and the court ought to have granted him a new trial.

Stephen on Pleading 116; Ewing *vs.* Price, 3 J. J. Marshall 522.

P. L. EDWARDS, for appellee.

Written argument filed.

McBRIDE, judge, delivered the opinion of the court.

Rachael Sconce brought her action of assumpsit in the Ray circuit court against John A. Beauchamp, for money had and received and for money lent. The defendant pleaded non-assumpsit, upon which issue was taken, and the cause submitted to the court, without the intervention of a jury, when the court found for the plaintiff and assessed her damages to \$104. The defendant thereupon filed his motion for a new trial, and in arrest of the judgment, which being overruled, he excepted and appealed to this court.

The evidence in the cause shows that the money sued for was the arrearages of a pension due to John Sconce, the late husband of the plaintiff, from the government of the United States, which had come to the hands of the defendant, who had advanced that amount of money to John Sconce during his life time, to save his property from execution, and under an agreement with the said John, to reimburse the defendant, out of his pension money.

It further appeared from the evidence, that the defendant had procured the making out of the necessary papers to draw the money, under an agreement with the plaintiff that the money when received, should be applied, in conformity with the arrangement, entered into by her deceased husband.

The court below was not called upon during the progress of the trial to decide any principle of law, and hence no question can be raised here for the exercise of the appellate jurisdiction of this court. The only question which can be investigated here *now* is whether the affidavit of the defendant, filed with his motion for a new trial, discloses facts which entitle him to have his case again tried.

In his affidavit the defendant states that since the trial of the cause, he has for the first time ascertained and discovered that John Elliott and Mahala Elliott are material witnesses for him—that he can prove by them that in the life time of John Sconce, he, the defendant, to save

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the property of the deceased from sale under execution, loaned to him \$100 on the agreement and pledge of said deceased, that the defendant should receive his pension money from the United States, in payment of his said loan; this was a short time before the demise of said John Sconce; and that since, the plaintiff promised him if he would have the papers prepared and procure the pension from the government, he might apply it to the payment of his said loan made to her husband. That he used all due and proper diligence, and made every exertion to be ready for trial, but failed to discover the evidence aforesaid until after the trial of this cause, &c.

The newly discovered evidence is cumulative merely, for evidence of the same import was given upon the trial, and the rule of law is that the discovery of parol evidence to a point tried in the issue, and upon which there was evidence, is not sufficient to authorize the court to grant a new trial, because such a practice would inevitably lead to fraud, subornation, delay and vexatious uncertainty.

Therefore the court committed no error in refusing a new trial; and the other judges concurring, the judgment is affirmed.

UNIV. OF MICH. LAW LIBRARY**APPERSON vs. INGRAM.**

1. To entitle a party to give parol evidence of the contents of original papers in a suit tried before a justice of the peace whose term has expired, he must first prove their loss either by the official certificate of his successor or by his examination under oath.

ERROR TO POLK CIRCUIT COURT.

McBRIDE, judge, delivered the opinion of the court.

Apperson brought his writ of forcible entry before a justice of the peace in Green county against Ingram. Ingram obtained a writ of certiorari and removed the case to the circuit court. The Judge of the Green circuit court having been of counsel in the cause, the same was removed by a change of venue to Polk county, where, upon a trial in

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that court, the plaintiff took a non-suit, which he subsequently moved to have set aside, but the court refused his motion, and he excepted, and sued out a writ of error from this court.

On the trial in the circuit court, the plaintiff introduced a letter from E. Headlee, who affixes to his name the initials J. P., and addressed to the plaintiff's attorney, in which he states that he finds on the docket of Daniel Appleby Esq., for 1837, that the plaintiff filed his complaint of forcible entry and detainer against the defendant, that a summons issued thereon, a trial was had and verdict and judgment against the defendant, on which a writ of restitution was awarded on the 24th June 1837; but that none of the papers of the suit are in his possession; and thereupon the plaintiff asked to prove, by parol, the contents of the papers in said cause; which the court refused, and the plaintiff excepted.

The plaintiff then proved the premises, set out in his complaint, to be situate in Green county, and in the section, township and range specified. That in November 1838, Ingram, the defendant, removed from the house, situate on the land described, some iron and blacksmith tools, and removed the forge erected therein, and afterwards took possession of said house. The iron and tools were the property of the plaintiff. This was all of the plaintiff's evidence.

The defendant then introduced evidence conduced to show that after the land in question was entered by him the plaintiff removed the fencing and fruit trees from the land, and ceased to cultivate it. He also offered in evidence the certificate of the Register of the land office showing that he had entered the land. The certificate had no date, and the plaintiff objected to its introduction, but the court overruled the objection, and permitted it to be read to the jury, the plaintiff excepted. No other evidence was offered, and thereupon the plaintiff took a non-suit.

The object which the plaintiff had in wishing to prove the contents of certain papers and proceedings had before Daniel Appleby, a late justice of the peace, was to show that a similar proceeding had been instituted by him against the defendant, and the same was prosecuted to judgment, and that a writ of restitution was awarded him for the premises in controversy, under which writ he was put into possession, and continued to hold and enjoy the same until dispossessed by the defendant in the manner proved. We do not think the letter of Mr. Headlee sufficient to authorize the plaintiff to prove, by parol, the contents of the papers which he desired to give in evidence. That letter does not show that the official papers of Justice Appleby are confided

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to his custody by law. He may be the successor, and, if so, he is entitled to the custody and keeping of his predecessor's official papers; but that fact does not appear from his letter. He says that none of the papers are in his possession; and so might any other individual in the community say the same thing, and yet that would not be sufficient to authorize the introduction of parol evidence. If Mr. Headlee was entitled by law to the custody of the papers of Mr. Appleby, he should have either certified officially their loss, or he should have been examined under oath to the fact.

The circuit court committed no error in refusing the parol evidence offered on this point by the plaintiff, and without such proof the plaintiff had not made out a case which entitled him to recover.

The judgment of the circuit court is affirmed.

MADDIN et al vs. I. & S. COLE.

1. Where a cause has been removed from one county to another by a change of venue an application by a party, for a rule upon the clerk of the court in which the suit was instituted, to transmit original papers in the cause, should specify distinctly and particularly the papers desired.

ERROR TO CIRCUIT COURT OF ST. FRANCOIS COUNTY,

FRISSELL for plaintiff.

It is insisted that the court below erred in compelling the defendants to trial when the clerk had failed to send up papers which were material for the defendants and which he could not by any possibility procure so as to use upon the trial the more especially when the defendant had been put in that condition by the act of the other party.

JOHNSON for defendant.

- 1st. The affidavit of the counsel should have designated distinctly what papers were not sent up by the clerk. It was too vague and indefinite to authorize a further delay of the case. The record had been in court upwards of four months and application ought to have

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been made for the rule at least on the first day of the term. To have granted the rule would have been permitting the defendants to gain a continuance upon grounds not authorized by law and not upon the usual terms, payment of costs.

2d. It appears from the record that the only books and papers ever called for by defendants were the journal, ledger, and day-book of plaintiff's. By consent, the leaves of the book containing the accounts were torn out and filed in lieu of the books themselves and the books withdrawn. The items could only be of any importance. These torn out leaves were copied by the clerk of St. Genevieve county and made a part of the record sent up to St. Francois county. The balance, struck on the account as settled by note, corresponds with the amount of the note sued on. The defendants had or might have had the benefit of these copies and if the counsel refused to specify any papers which the clerk had not sent up the defendants cannot complain if the court overruled the motion.

McBRADE, judge, delivered the opinion of the court.

I. & S. Cole instituted an action of assumpsit in the Ste. Genevieve circuit court against the administrators of Richard Maddin, deceased, and after certain proceedings were had in that court the cause was removed by a change of venue to the St. Francois circuit court, where the plaintiffs obtained judgment: the defendants prayed for a new trial, which was refused, and they excepted, and have brought the case here by writ of error.

The error complained of was the refusal of the court to grant a rule upon the clerk of the Ste. Genevieve circuit court to certify and transmit to the St. Francois circuit court certain papers appertaining to the cause which were on file in his office. The motion made for the rule is accompanied by an affidavit of the attorney in the cause, which states "that there were papers on file in the office of the clerk of Ste. Genevieve county, in the above entitled cause, which papers were originals, or, by the consent of the parties, copies to be used as originals, and which papers are material in the cause." The court required the attorney to designate, in his affidavit, the papers not returned, which he declined doing on the ground that his recollection was not sufficiently distinct to describe them; thereupon the court overruled the motion and refused the rule.

It appears from the record that the defendants obtained an order on the plaintiffs to file a bill of particulars in the case; and also to produce the books in which the charges were made against the intestate; that, in compliance with the order, the original account was cut from the book, and filed as a bill of particulars; and that this original account was not sent to the St. Francois circuit court by the clerk of the Ste. Genevieve Circuit court, but a certified copy was transmitted with the other papers in the cause.

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We cannot perceive the necessity of having the original account, nor what injury the defendants could possibly sustain in consequence of its not having been transmitted with the other papers in the cause. The certified copy was in the St. Francois court, and no objection was made to using it on account of its being a copy. But we consider it the duty of parties requiring the action of the court in cases of this kind, to set out in their application distinctly and particularly the papers which they desire, so that the court may be enabled to decide whether they are in fact important in the decision of the cause, and the court is not bound to act upon the presumption of their materiality, because the attorney in the case so regards them, without being able to designate what they are, or, being able, pertinaciously refuses to give to the court the desired information.

Judge Napton concurring herein, the judgment of the circuit court is affirmed.

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1. Sales of real estate of deceased persons made for the payment of debts should conform to the requisitions of the statute.
2. The statute confers no power on a sheriff to sell the real estate of deceased persons for the payment of debts.

APPEAL FROM GASCONADE CIRCUIT COURT.**SKINNER for appellant.**

The appellant insists upon the reversal of the decree for the following reasons:

- 1st. Because the said Russick & Betzhold appellees let judgment go against them in the suit at law, and did not avail themselves of their defence on the trial at law before a jury, or the court sitting as a jury, nor did they bring the ground of their defence before the court of law on a motion for a new trial. Bateman vs. Willoe, Schoale & Leproy's reports, 1 vol. 203; Baker vs. Elkins 1 Johnson C. R. 465.

For if they had knowledge of their defence and neglected to make it they are concluded by the judgment at law. Lequen vs. Governeur & Kimble, 1st Johnson's cases 436.

- 2d. Chancery will not relieve against a judgment at law unless the defendant was ignorant

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of the fact in question pending the suit or it could not be received as a defence there. Simpson vs. Hart, 1st Johnson C. R. 91.

3d. If a defendant neglected to set up matters of defence before arbitration or a jury, he cannot afterwards make such matters the basis of a suit in equity unless there was some accident or fraud of which the party could not avail himself at law. *McVicor vs. Walcott*, 4 Johnson's Rep. 509.

4th. Equity will not entertain jurisdiction of a matter which the party has had an opportunity of litigating in another court and which has been there decided against him. Kinn's quarterly law compendium for 1843, page 145-6.

5th. The neglect of a party to make his defence at law is no ground for equity to interfere. Cowen vs. Price, 1 Bibb 173; Isbell vs. Morris et al, 1 Stew & Porter 41; Holding vs. Holding 1 Murphy 10; Walker vs. Smith & Yeager 233; Veech vs. Pennebacker 2 Bibb 32; Wilson vs. Cluskere 1 McCord Ch. Rep. 241; Cunningham vs. Caldwell Hardin 123; Hampton vs. Dudley 1 J. J. Marshall 274; Mark vs. Cundiff 6 Porter 24; French vs. Garner et al, 7 Porter 549; Moore vs. Deal 3 Stewart 155; Thomas et al, vs. Hearn et al, 2 Porter 177; W. Smith et al, vs. James Walker et al, 8 Medes & Marshall's Rep. 131; Matson vs. Field & Cathcart 10 Mo. R. 100.

FRISSELL for appellees.

The defendant in error contends:

1st. That the consideration of the bond had clearly failed, or rather it was without consideration. No title passed to the purchaser. Acts 1845, 85, 86, 87.

2d. That the act of the Mo. Legislature of 1845, page 832, does not take away the jurisdiction of the chancery court in cases of failure of consideration. Acts 1845, 832.

McBRIDE, judge, delivered the opinion of the court.

This was a bill in chancery, filed in the Gasconade circuit court by Russick and Betzold against Jarvis, the object of which was to enjoin a judgment at law obtained by Jarvis against Russick & Betzold on a promissory note given for the purchase of a tract of land; and to set aside, vacate and annul the sale. The decree in the circuit court was in favor of Russick & Betzold, from which Jarvis appealed.

The bill charges that at the instance of John B. Jarvis, who represented himself to be a creditor of the estate of William Jarvis deceased, the county court of Gasconade county at their July term 1844 "ordered that the sheriff of this county proceed to sell to the highest bidder, on a credit of twelve months, on the first day of the next term of the Gasconade county court, to be holden in the town of Herman on the fourth Monday in October next, so much of the real estate of William Jarvis deceased as will be sufficient to pay to John B. Jarvis the sum of seventy-two dollars and eighty-nine cents, with interest and costs of suit, and make report of the same according to law," &c. &c., that the sheriff did not sell at the then next term of the county court

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as directed by said order, but, at the following January term 1845, offered for sale a portion of the real estate of the said William Jarvis, and the defendant Russick became the purchaser of seven and three fourths of an acre, for the sum of \$73 97, for which he executed his note with his co-complainant Betzold as his security, to the defendant Jarvis, and which is the same note sued upon.

That he subsequently obtained a deed from the sheriff for the said land, but that the deed is only for seven acres, and shows upon its face the illegality of the whole proceeding, in this, that the county court had no legal authority to order the sale, and that the sheriff did not sell in conformity to the order of the county court.

That judgment has been obtained on the note given for the purchase money, and the payment is sought to be coerced without any consideration having been obtained by the complainants, or any means afforded them by law to obtain a title to the land purchased by them.

The answer denies the illegality of the order and the irregularity of the sheriff's sale made under the same, and prays a dissolution of the injunction, &c.

The sheriff's deed, being in evidence, shows that the sale was made, as charged in the bill, on the 27th January 1845, and that the complainants became the purchasers of seven acres of land, it being an undivided part of a forty acre tract belonging to the estate of William Jarvis deceased.

It was further in evidence that the order of the county court directing the sale was made without the previous requisitions of the law having been complied with.

The 8th sec. of the 3d art. of the administration law, R. C. 1835, p. 52, provides that "if any person shall die and not have personal estate sufficient to pay his debts, the executor or administrator shall file a petition to the county court stating the facts, and praying for the sale of the real estate, or so much thereof as will pay the debts." The 9th sec. directs that "such petition shall be accompanied by a true account of his administration, a list of the debts due to and by the deceased, and remaining unpaid, and an inventory of the real estate and of the remaining personal estate, with its appraised value, and all other assets in his hands, the whole verified by the affidavit of the administrator or executor." The 10th sec. provides that any creditor or other person interested in the estate may make the application, they giving to the executor or administrator twenty days previous notice thereof. The 11th sec. makes it the duty of the executor or administrator, on or be-

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fore the first day of the term at which he is notified that the application will be made, to file a true statement of the accounts, lists and inventories as provided in the ninth section. Upon this being done the 2th sec. provides, the county court shall make an order requiring all persons interested in the estate to be notified thereof; and the notice to be published for six weeks in some newspaper in this State. The 13th sec. directs that upon proof of the publication having been made "the court shall hear the testimony and may, if necessary, examine all parties on oath touching the application, and make an order for the sale of such real estate, or any part thereof in this State, at public or private sale."

The 15th and 16th sections provide for the appointment of appraisers of the real estate to be sold, and prescribes their duties. The 17th sec. requires the executor or administrator to cause a notice containing a particular description of the estate to be sold, the time, place, and terms of sale to be published in some newspaper in this State for four weeks, and shall put up a copy of such notice in ten public places in the county in which the sale is to be made, twenty days before the sale. The next section directs where, when, and how the sale is to be made. Section twenty requires the executor or administrator to make a report of his proceedings to the next term of the court, verified by affidavit. If not approved, the sale to be void and a new sale ordered. The 22d sec. provides "that if such report be approved by the county court, such sale shall be valid, and the executor or administrator, as soon as full payment shall be made of the purchase money, shall execute, acknowledge and deliver to the purchaser a deed, stating the order of sale and the court by which it was made, and the consideration, and conveying to the purchaser all the right, title and interest which the deceased had in the same."

It will be perceived at once that the county court in the case now before us, have not pretended to conform their action to the requisitions of the Statute. All the safe-guards thrown around the real estate of deceased persons to prevent unnecessary alienation from the heirs, and to protect it from mal-administration, have been entirely disregarded. The administrator in the case comes into court, and asks the court to order the sale of a portion of the real estate of his intestate, to pay a debt due to him, which has accrued to him since the death of the deceased, and the court, without having an eye to the statute, make an order that the sheriff of the county, at the next term of their court, sell so much of the real estate of the deceased as shall be sufficient to pay the administrator his debt. And the sheriff, under this order, it is

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said, had a right, at a subsequent term of the court to that named in the order, to sell and convey to the purchaser a good and sufficient title. We do not observe any power conferred by the statute on the sheriff to sell the real estate of deceased persons for the payment of debts. The statute directs the executor or administrator to carry into effect the order of the county court, and no reason is perceived for passing by the individual charged by law with this duty, and to confer it upon another.

We are of opinion the circuit court did not err in perpetuating the injunction, and that its judgment ought to be affirmed.

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1. The circuit court has jurisdiction over all actions instituted against a constable on his official bond, regardless of the amount claimed.
2. In suits upon a constable's bond, the circuit court and justices of the peace have concurrent jurisdiction, where the amount claimed does not exceed ninety dollars.

APPEAL FROM CIRCUIT COURT OF HOLT COUNTY.

WILSON for appellant.

The only question in this case is whether appellee was entitled to recover the aforesaid interest upon the amount of his execution. The record shows that the appellant excepted to the opinion of the court below in giving said instruction, and also in overruling his motion for a new trial. There are three statutes, the constable's law, Statutes of Mo., 1835, 117, sec. 8; the execution law, Hid. 269, sec. 52, and the law regulating justice's courts, Hid. 368, sec. 22; providing different remedies, and imposing different penalties on officers delinquent in returning executions, neglecting to levy, &c. The first gives double the amount of the execution; the second, the full amount thereof, and the third, the full amount thereof with interest at the rate of one hundred per centum per annum. "Either of these statutes may be put in force without bringing its provisions in conflict with the other. They are not repugnant, as they provide different remedies and impose different penalties. The party injured has the liberty of choosing the nature of his remedy, and the nature of the remedy adopted, will show the penalty sought." Hart *vs.* Robinett, 5 Mo. Rep 15. The constable law confines the remedy to a summary proceeding, a notice before a justice's court in which the plaintiff should specify the amount of his execution, the breach of duty by the constable, and the amount claimed by reason of such breach, to wit: double the amount of the execu-

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tion. The justice's law confers a like remedy, where the plaintiff should make like specifications, claiming the amount of the execution with interest thereon at the rate of one hundred per centum per annum. Of these two remedies, justices have exclusive original jurisdiction when the sum sought exclusive of interest does not exceed ninety dollars. But the appellee will insist that the 23d section of the justice's law brings this case within the provision of that statute which was only intended to extend the jurisdiction of justices upon suits upon constable's bonds, where the amount claimed did not exceed ninety dollars, in which case plaintiff should file before the justice the constable's bond, or a copy, together with the amount claimed, so as not to exceed ninety dollars, and assignment of a breach of the bond for which the same was claimed. The remedy under the execution law is by an action of debt (on case) upon the constable's bond in the circuit court as in this case assigning the usual breaches, and claiming the whole penalty of the bond in this case, five thousand dollars, and recovering if at all the amount of the execution which the constable had failed to return, or with which he was otherwise derelict in duty. Inasmuch, then, as the plaintiff below has chosen his remedy under the provisions of the execution law, his recovery should be confined to the penalty it provides which is the amount of the execution.

STRINGFELLOW for appellee.

The only objection made to the verdict and judgment, is that the plaintiff below recovered one hundred per cent per annum from the time the execution ought to have been returned. This action is founded upon the 23d section of an act to establish justice's courts of 1835; Rev. Code, page 368, which gives this recovery. The proceedings under 9th section of act respecting constables, page 117, are only to be had before a J. P., and the provisions of that act had no reference to this suit, nor are the provisions of that act regulating executions applicable to remedies against a constable, the provisions of that act apply only to executions issued from a court of record, except those especially made applicable to executions from a justice of the peace, by the 37th section, which has no reference to the remedies against the officers for failing to execute their duty on executions.

McBRIDE, judge, delivered the opinion of the court.

Prince L. Hudgens brought his action of debt in the Holt circuit court, in the name of the State of Missouri to his use, against Pollock, the defendant, as principal, and others as his securities, on his constable's bond. The plaintiff obtained judgment below, which the defendant moved to set aside, and for a new trial, which were refused, and he excepted and appealed to this court.

The declaration contained several counts assigning the usual breaches in such cases. The evidence went to show that the plaintiff having obtained a judgment before a justice of the peace in said county, against one Mitchell, for \$25 debt; \$4 25 damages, and \$2 18 costs, sued out execution thereon, and placed the same in the defendant's hands for collection, and that said defendant levied the same upon a wagon as the property of Mitchell, and afterwards permitted Mitchell to remove the

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same out of the county, without sale, and then returned the execution "not satisfied for want of sufficient property to levy on." The wagon was estimated to be worth from fifteen to forty dollars. Judgment for \$119, being one hundred per cent per annum.

Several instructions were asked of the court which it is not necessary to notice, as but one question is raised in this court for our determination, and that is the right of the plaintiff to recover the amount of his execution with one hundred per cent per annum thereon.

The legislature has given several remedies against a constable for a failure to discharge his duties, either of which a party aggrieved may pursue at his election. The first act on the subject is to be found in the Rev'd Code, 1835, p. 117, § 8, which subjects the constable to pay double the amount of the plaintiff's debt, where he fails to pay over when demanded, money received by him, or when he fails to return an execution according to the command thereof, to be recovered by motion before a justice of the peace. The second is at page 260, S. 52, and provides that if any officer having an execution in his hands, shall neglect or refuse to execute the same, or, having levied the same, shall fail to sell the property levied upon, or shall not return the writ, or make a false return thereof, he shall pay the whole amount of such execution. The third remedy given by law is at page 368, § 20, which provides that if the constable fail to make return of the execution according to the command thereof, or if he make a false return, the justice shall, upon the demand of the party injured, issue a summons against the constable, &c. The twenty-first section prescribes the manner of proceeding before the justice. The twenty-second section provides that if the constable fail to appear, or, appearing, fail to show good cause to the contrary, the justice shall render judgment against him for the amount due by the execution, &c., with interest thereon, at the rate of one hundred per centum per annum, from the time such execution ought to have been returned, &c. Section twenty-three gives the party injured the right to proceed against the constable as above directed, or he may institute a suit against him and his securities on his official bond, and in such suit shall be entitled to the like recovery, as upon a summons against the constable, and suits on the bond may be brought before a justice of the peace, where the amount claimed does not exceed ninety dollars.

The action in this case was brought under the law last above referred to, and therefore it is not important to inquire what would have been the parties rights under the two preceding acts, as no proposition is better

POLLOCK vs. HUGGENS.

settled than that, where a party has two or more remedies given him by law, he may pursue that one which, under all the circumstances of the case, he deems most advantageous to him. The latter clause of the twenty-second section gives to a party injured the right of bringing his action before a justice of the peace on the constable's official bond, where the amount claimed does not exceed the jurisdiction of a justice of the peace, but this does not, I apprehend, divest the circuit court of its general jurisdiction in such cases. The language of the provision does not evince such an intention on the part of the law makers, but it is only permissive, giving to the plaintiff the right, if he sees proper, in such case to bring his action before a justice of the peace.

We are therefore of opinion that the action was properly brought in the circuit court, and that the judgment for one hundred per cent per annum on the amount claimed from the time the same ought to have been paid, is recoverable under the statute.

The other judges concurring, the judgment of the circuit court will be affirmed.

SCOTT, judge.

I concur in affirming the judgment, but dissent from that portion of the foregoing opinion which maintains that for a sum less than fifty dollars, suit may be brought on the constable's bond in the circuit court. There is no reason for subjecting constables and their securities to that more expensive mode of procedure than all others; and the statute is express that the circuit and justice's courts shall only have concurrent jurisdiction in actions of debt when the sum in dispute exceeds fifty, and is less than one hundred and fifty dollars. The opinion is moreover opposed by the case of the State of Missouri, to the use of Poor *vs.* Steel. 11 Mo. Rep., 553, in which it was decided by a full court, that when the sum claimed of the constable is less than fifty dollars, a suit on his official bond can only be brought in a justice's court.

BRADFORD vs. PEARSON.

BRADFORD vs. PEARSON.

1. It is not indispensable to the giving of an instruction, that the evidence should establish conclusively the hypothesis stated in it; if there be any evidence conducing to establish the assumption; it is sufficient to authorize the giving of the instruction, and it is for the jury to find whether the facts stated are made out by the evidence.
2. Where the circuit court permitted a party to give in evidence his own declarations to prove a fact, the judgment will not be disturbed for that reason, if the same fact was established by other and legal evidence.

ERROR TO SALINE CIRCUIT COURT.

HAYDEN for plaintiff in error, insists,

- 1st. That the court erred in giving to the jury the said instructions prayed for by plaintiff.
- 2nd. The circuit court erred in refusing to give to the jury said several instructions of defendant which were rejected by the court.
- 3d. The court ought to have granted the defendant a new trial of the cause for the reasons set forth in his said motion therefor.

STRINGFELLOW for defendant in error.

The only question presented by the record is the sufficiency of the evidence to sustain the plaintiff's declaration. That question was fairly presented to the jury by the instructions and was found by them. The instructions refused, assumed that plaintiff did not complain of his discharge, and that having uttered no complaint, he is to be considered as consenting to his discharge.

If there be error in the instruction which authorized the finding interest for plaintiff, it is cured by the remittitur of plaintiff.

It was not necessary for plaintiff to offer to perform the contract after his discharge.

McBRAIDE, judge, delivered the opinion of the court.

This was an action of assumpsit brought by Pearson against Bradford in the Saline circuit court. The declaration contained a common count for work and labor, and a special count alleging that the defendant employed the plaintiff as a pill-pedler and collector for one year at the sum of \$300, and that the plaintiff entered the service of the defendant and continued therein for the space of six months, at the expiration of which time, and without any sufficient cause therefor, the defendant discharged him from his employment, &c. The defendant pleaded the general issue under the statute of the last General Assembly. A trial was had and a verdict found for the plaintiff; whereupon the defendant moved for a new trial, which the court refused, and he excepted, and has brought the case here by writ of error.

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On the trial in the court below, evidence was given tending to prove that in the spring of 1846 the defendant hired the plaintiff to vend pills and collect money for him in the State of Illinois; that the plaintiff prior to his setting out for Illinois, served the defendant twenty days, at fifty cents a day, in manufacturing pills; that on the 1st of August 1846 the plaintiff proceeded to the State of Illinois for the purpose of peddling pills and collecting money due the defendant in that State, and continued in said service until the 1st of October next following, when he returned to defendant's house; that in consideration of his services to be performed, the defendant was to pay him \$300 per annum, to be paid at the expiration of the year; that a day or two after the plaintiff returned from Illinois, the defendant informed the plaintiff's father that he had discharged the plaintiff from his service, because the plaintiff had, whilst in his service, expended more of his money than his wages amounted to. The witness, on cross-examination, stated that the plaintiff did not complain to them of the conduct of the defendant in discharging him, nor that the discharge was against his consent, or that he objected thereto.

The defendant then offered evidence of the contents of a letter from the plaintiff, whilst in Illinois, to the witness, in which he complained of the service which he had to perform, and that he would not undertake such another trip for any consideration: also evidence that whilst plaintiff was in his service, in Illinois, he expended more of defendant's money than another agent engaged in the same service, and that plaintiff was not in his employ after his return home on the 1st of October 1846.

The plaintiff thereupon asked, and the court gave to the jury the following instructions.

1st. If the jury find from the evidence that the defendant hired the plaintiff for twelve months at the price of \$300, and that the plaintiff entered into his service under said hire, and was ready and willing to perform the services, and was discharged therefrom by the defendant without his (the plaintiff's) consent, then the plaintiff is entitled to recover the whole amount of the \$300, with interest at six per cent. per annum from the time it became due, after deducting what the plaintiff may be entitled to by way of offset.

2d. That it was no sufficient cause for discharging the plaintiff, that the plaintiff's expenses, whilst engaged in defendant's business, amounted to more than his salary for the current time.

The defendant then asked thirteen instructions; seven were given

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and six refused. The defendant excepted to the opinion of the court in giving the instructions asked by plaintiff, as well as in refusing those asked by him.

There can be no serious objection urged against the instructions given by the court at the instance of the plaintiff; and the only one relied on is that the evidence did not warrant the court in giving them. It is not, however, indispensable to the giving of an instruction that the evidence should establish conclusively the hypothesis stated therein; if there be any evidence conducing to establish the assumption, it is sufficient to authorize the giving of the instruction, and it will be for the jury to find whether the facts stated are made out by the evidence. But if it were that there was no evidence upon which to found the instruction, still this court would not reverse the judgment for that reason, unless it was apparent that the jury had been misled by the instruction. We are of opinion however that the evidence warranted the instructions given, and that the instructions contain correct legal principles.

We do not conceive it necessary to incorporate, at length, in this opinion, the *thirteen* instructions asked by the defendant, seven of which were given. The substance of those given, omitting the tautology, is as follows: To entitle the plaintiff to recover upon the special court in the declaration, it devolved upon him to prove the contract declared upon, and that he performed the services or was ready and willing to perform, but was prevented from the performance by the defendant, without sufficient cause; and that he was discharged by defendant from his service against the consent of the plaintiff. That the plaintiff cannot recover if the jury find that he collected money due the defendant, and improperly spent, wasted or failed to account for the same, or acted unfaithful in the discharge of his duties to the defendant; or if the plaintiff was indebted to the defendant in an equal or larger amount than that sued for by the plaintiff.

The instructions given embrace every conceivable or possible phase which the case could be tortured to present, and there was, therefore, no necessity for giving the other instructions asked by the plaintiff even if they had contained correct law; except the sixth asked and refused. It was not competent for the plaintiff to give in evidence his own declarations or statements that he had been discharged by the defendant, for the purpose of establishing the fact of such discharge. But as this point in his case was established by other and legal evidence, the judgment will not be disturbed for that reason.

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Before the judgment was entered, the plaintiff remitted the amount of interest found for him by the verdict of the jury.

Wherefore the judgment of the circuit court ought to be affirmed, and, the other judges concurring, the same is affirmed.

WOOD vs. HARRIS.

1. Should the true intent and meaning of a deed be mis-stated in the declaration, the variance is cured, if the deed be set out in the plea on *oyer* and *non est factum* be pleaded.
2. On such issue the only question at trial is, whether the deed, as set out in the plea, was executed by the defendant or not.

ERROR TO SALINE CIRCUIT COURT.

HAYDEN, for plaintiff in error.

1st. That the court erred in rejecting, upon the trial of the cause, the said writing obligatory as evidence in proof of the issue upon the plea of *non est factum*. The instrument being set out by *defendant* on *oyer*, became a part of the declaration, and the proof offered corresponded therewith and with the declaration as prepared by plaintiff. See 1 Chitty 467, 468.

2d. The court erred in not granting the plaintiff a new trial upon his said motion therefor.

1st The writing obligatory offered in evidence ought not to have been excluded as evidence upon the issue taken on the plea of *non est factum*. It was *competent* and *relevant* upon both counts of the declaration. The counts of the declaration are *inartificially* framed, and are *informal* yet they are in substance good and such as opened a door for the proof offered.

But if defective that defect was and is cured by the defendant having set the bond out on *oyer*, as being the same instrument on which the two counts are framed thereby making the instrument as set out part and parcel of each count of the declaration. See 1st Chitty 467, 468.

The question then presents itself, does the instrument offered in evidence correspond with the counts or either of them as thus amended by defendant in his said specification upon his *oyer* thereof in his plea, surely nothing could have been better evidence, for the instrument set out in the plea and in the declaration, are exact copies of the one offered in evidence. The only advantage which defendant could have taken or availed himself of was one which a demurrer perhaps might have reached, but he did not embrace it, and I hold that he could not object to the proof offered by plaintiff which was literally and legally the proof demanded by the issue.

WOOD vs. HARRIS.

McBRIDE, judge, delivered the opinion of the court.

Wood the plaintiff brought an action of debt against the defendant Harris and Howell O'Neal in the Saline circuit court. The declaration contained two counts. The first count declared upon a writing obligatory executed by the defendants to the plaintiff, setting the same out substantially. The second count copies the writing sued on *in extenso*, and assigns breaches thereon.

The defendant craved oyer of the writing sued on, set the same out, and plead non est factum without affidavit. He also filed a plea of offset. Issues were taken by the plaintiff, and the cause was submitted to the court, sitting as a jury, when the plaintiff offered to read the instrument sued upon as evidence in the case, to which the defendants objected, and their objection was sustained by the court. Whereupon the plaintiff took a nonsuit, and subsequently moved to set the same aside for the reason that his evidence was rejected by the court, but the court over-ruled his motion, and he excepted, and has brought the case here by writ of error.

It is not now necessary to inquire whether the declaration be sufficient in law to authorize the instrument of writing sued on to be read in evidence. The defendant is precluded, by the pleadings in the cause, from now raising that question.

Mr. Chitty, in his pleadings vol. 1 page 467, lays down the rule as follows. "If the deed be set out on oyer, it becomes parcel of the record, and the court will adjudge upon it accordingly, though it were not strictly demandable when granted. Should the true fact and meaning of the deed be mis-stated in the declaration, the variance is cured and becomes immaterial, if the deed be set out on the plea on oyer and non est factum be pleaded; for on that issue the only question at the trial is, whether the deed, as set out in the plea, was executed by the defendant or not, and the jury are not competent to decide what is the legal effect of the deed."

The plea not having been verified by affidavit, the plaintiff had the right therefore to read the bond in evidence.

The other judges concurring, the judgment of the circuit court is reversed, and the cause remanded.

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12	76
49a	544
12	76
124	501

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1. Before a plaintiff can recover against an answer made by a garnishee, he must disprove it according to the ordinary rule of disproving an answer filed to a bill of discovery.
2. A debt evidenced by a negotiable note may be attached in the hands of the *payor* to satisfy an execution debt of the *payee*.
3. An attorney at law entrusted by the plaintiffs with the management of an execution in their favor against A., cannot release and discharge from answering to the attachment. A garnishee summoned as a debtor of A., without a special authority, express or implied from his clients :—such release, by an attorney at law, without special authority from his clients, is not in the line of his general employment, and is *inoperative*.
4. Sheriff had five executions in his hands at the same time in favor of different persons, against the same defendant ; he served one notice of garnishment upon A., in which he was required to appear and answer such interrogatories as might be filed by the several plaintiffs naming them, touching his indebtedness to defendant.

Held to be a sufficient service of the notice.

ERROR TO COOPER CIRCUIT COURT.

HAYDEN for plaintiffs in error, insists.

1st. That at the time the defendant was summoned as garnishee in the cause, he was indebted to Pearce, in the sum of \$800, by virtue of the note given by him to Pearce therefor, and that there is no evidence in the cause conducting to show that the note had been assigned by Pearce to Sharp before the garnishment, but if there be any legal evidence of the assignment, it conduces to show that the same was made by and between Pearce and Sharp, to prevent the debt therein specified from being attached by plaintiffs for their said debt, and that therefore the said assignment was, and is, fraudulent and void, as against the plaintiffs as creditors of the defendant Pearce. 7 Mo. Rep. 436; 6 Ib. 358; 17 Mass. Rep. 558; 16 Mass. Rep. 318; 11, Ib. 299, 300-1; 17 Con. Rep. 492. See the authorities referred to in these cases, 17 Maine Rep. 359. 360. See Mo. Dig. sec. 27 to 35 inclusive, page 140-1. Title attachment, see same, (1815) 476, sec. 6.

2d. That the circuit court erred in rejecting the evidence of Gitt, a witness, and other evidence offered by the plaintiffs upon the trial of the cause. The evidence of Gitt which was rejected, was proper to identify the note as the note of \$800, and to negative the fact alleged by Porter in his answer that it had been assigned by Pearce to Sharp, as he had been informed and believed.

3d. That the court erred in permitting the defendant Porter to read *the whole* of his answer, with the affidavit and the alleged release of Combs, accompanying the same as evidence upon the trial of the cause.

4th. That Combs had no authority as attorney at law, or attorney in fact for the plaintiffs, to discharge the defendant, as *garnishee* from liability to answer over to plaintiffs for the said \$800 mentioned in said promissory note. 1 Pick., 350-1; 10 John 220, 8 Ib.; 361; 1 Cow, 498 9; 6 John 51-2-3.

5th. That the circuit court erred in refusing to give to the jury *said several instructions* which were asked by plaintiffs and refused by the court.

6th. That the court erred in giving to the jury the said several instructions moved for by the defendant.

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7th. That the court erred in refusing to set aside the verdict, for the reasons mentioned in the plaintiffs motion therefor.

LEONARD & STRINGFELLOW for defendant in error.

1st. The answer is to be taken as true, both as to the assignment of the note given by defendant and the release given to defendant, until it is disproved by evidence. It is not necessary that defendant should prove the facts alleged in his answer, and the second instruction asked by plaintiffs was properly refused. *Black vs. Pane*, 10 Mo. Rep. 102; 8 Mo. Rep. 657.

2d. The only indebtedness for which defendant could be liable, if for any, on this note, was an indebtedness as the time he was summoned as a garnishee. It is absurd to contend that any indebtedness arriving after the attachment or service of notice could render defendant liable. If so, all transactions between defendant and the debtor would be prohibited from the time of the service of notice until the answer of defendant could be filed, although the execution itself might have been long returned. The second instruction asked by plaintiff was therefore properly refused. *R. C. 1835*, page 254; 1 Ala. Rep. (N. S.) 396; 2 Ib. 319.

3d. The release did not purport to be executed by Combs as "an attorney at law," and hence the fifth instruction asked by plaintiffs was properly refused.

4th. The answer did not allege that Combs, as attorney at law, executed the release, but averred that he "had authority to make the release." It was thus immaterial how he acquired his authority, and the fourth instruction given for defendant placed this matter before the jury properly, if not too favorably for plaintiffs.

5th. Combs, as an attorney at law for the plaintiffs, had the right to release and discharge the defendant from answering to the garnishment. This principle was waived by defendant on the trial, as not necessary to his defence, and it is now only asserted that he may not be deemed as admitting the correctness of the first and third instructions given for plaintiffs.

An attorney at law, as such, has an undoubted right to dismiss any suit of his client, an attachment as well as any other. Under our statute, he can do this in vacation, as well as in court. A garnishment under execution is but one form of a suit—a peculiar one, it is true, but no less governed by the rules applicable to other forms. Its dismissal is no compromise of any right of the plaintiff, for he has no right until a judgment is rendered. Though the attorney might become liable to his client, his act would still be valid and binding on his client. *Gaillard & Granilon vs. Smart*; 6 Cowen, 385.

6th. In this case, however, the answer and evidence shew that Combs had authority "to do the best he could with the case." His acts, not as an attorney at law, but as agent, were recognized by plaintiffs.

7th. The note given by Porter being negotiable, the policy of the law concerning such instruments, and the manifest injury and oppression which would necessarily result to the maker or the frauds which the law would practice upon endorsees, if such debts could be attached, must preclude any other conclusion than that this debt cannot be attached. 4 Mass. Rep. 508; 13 Mass. Rep. 215; 5 N. H. Rep. 502; 5 Ark. Rep. 55; 10 Mo. Rep. 374; 9 Mo. Rep. 382; 8 Mo. Rep. 660.

8th. Although the endorsement may have been without consideration, and with the intent to defraud the creditors of Pearce, it was yet valid as to Porter, a want of consideration, or fraudulent intent, was no defence to him, although the proceeds in the hands of Sharp might, as to creditors, have been held the property of Pearce. For this reason, the sixth, seventh and eighth instructions asked by plaintiff were properly refused.

9th. The consideration of, or fraudulent intent in the endorsement of the note, could not

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be inquired into in a contract between these parties. Those questions, if at all, could only be investigated on a notice to, or garnishment of the assignee. 17 Maine Rep. 401; Rev Stat Maine, 530, 531.

10th. If the note appear from the answer, or evidence to have been assigned, it is the duty of the plaintiff to bring the assignee into court. The necessity of avoiding the assignment and proving the indebtedness of the defendant by showing the real owner of the note, devolving upon the plaintiff. 17 Maine Rep. 401.

11th. Porter not being charged as privy to or cognizant of the alleged fraud in the transfer of the note, the sixth, seventh and eighth instructions asked by plaintiffs, were properly refused.

12th. There was no sufficient service of the attachment in this case. The notice set out in the answer, and which is admitted to have been the only one served upon defendant, was not a summons to answer to these plaintiffs, but others, and not upon this execution, but upon "five executions," in favor of other plaintiffs.

This objection may be made in the answer of a garnishee, it not being governed by any special rules of pleading, but intended to enable the defendant to set up any defence as against the debtor in the execution, or to prevent the recovery of plaintiff. 9 Mo. Rep. 236.

13. Admitting that all our previous positions are incorrect, if the court should be of opinion that the service was insufficient, it will not reverse the judgment of the circuit court and send the cause back to be there dismissed on the motion for that purpose, filed by defendant. A judgment will not be reversed, although erroneous, if no injury has resulted to the party against whom it is rendered.

McBRIDE, judge, delivered the opinion of the court.

Quarles and Thompson having obtained judgment in the Cooper circuit court, against Thomas Pearce, caused an execution to be issued thereon, directed to the sheriff of Chariton county, which was levied on some real estate and personal property of Pearce, and also service on William Porter, as garnishee, to appear at the next term of the Cooper circuit court, and answer such allegations and interrogatories, touching his indebtedness to Pearce, as might be exhibited against him by the plaintiffs. The service was on the 3d of August, 1844.

At the March term, 1845, of the Cooper circuit court, the plaintiffs filed their interrogatories against Porter, the garnishee, which, at the September term following, he answered.

The answer states substantially, that in the forenoon of the 3d of August, 1844, the respondent purchased of the defendant, Pearce, a tract of land, at the price of \$800, to be paid on the 25th December, following, and executed and delivered to him his negotiable promissory note for the same—that in the afternoon of the same day he was summoned as garnishee; but, prior to the service of the garnishment, he has been informed and believes that his note was assigned and delivered by said Pearce, to one James Sharp, for a valuable consideration, and

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that at the time he was summoned as garnishee, the legal title to his said note was in the said Sharp, and hence he was not indebted to said Pearce, at the time he was summoned as garnishee.

The answer further states, that on the 25th October, 1844, it was agreed by and between the said Pearce and one Joseph Combs, acting for and in behalf of the plaintiffs, that Pearce should pay the said plaintiffs \$100; in consideration whereof, this affiant should be released from the garnishment, and not be required to answer the same, and that the sheriff of Chariton county should return the executions in his hands not served on respondent; thereupon the said Combs, on behalf of the plaintiffs, executed to the respondent a written release and discharge from the attachments, as he had the legal right to do. That after the making of the foregoing agreement, the respondent paid to said Pearce, who then had his note in possession, the full amount of said note, under the belief that he then had a right to pay the same.

A general replication was filed by the plaintiffs, putting in issue the truth of the affiant's answer.

Upon the hearing of the evidence, the jury rendered a verdict in favor of the defendant; when the plaintiffs filed their motion for a new trial, which being overruled by the court, they excepted, and have brought the case to this court by writ of error.

To sustain the issue on their part, the plaintiffs introduced evidence, conduced to prove that the assignment made by Pearce to Sharp was fraudulent, and made for the purpose of hindering and delaying creditors; and if Porter was not privy thereto, yet the circumstances attending the transaction, of which he had information, were sufficient to inform him of the fraud; that Combs was not employed as agent or attorney, by the plaintiffs, and hence had no authority to make the agreement set out in the answer.

The defendant also introduced evidence conduced to sustain the statements made in his answer.

The plaintiffs prayed the following instructions to the jury:

1. That if the jury find from the evidence that Joseph Combs was a licensed attorney at law, and further find from the evidence in the cause, that the execution of Quarles and Thompson was placed in his hands as such attorney to have the debt, &c. therein specified, collected of the defendant, Pearce, and further find that the said Combs, as such attorney, delivered or caused said executions to be delivered to the sheriff of Chariton county, and that afterwards, and whilst said execution was in full life, the said sheriff summoned said William Porter,

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as garnishee, upon said execution, to appear and answer interrogatories touching his indebtedness to the defendant in the execution, as is testified by the sheriff, and that said Porter was at the time he was so summoned as garnishee, indebted to said Pearce, that the said Combs, by virtue of his authority as attorney at law, had no right to release or discharge him, the said Porter, from his liability to answer the plaintiffs interrogatories upon such garnishment.

2. That in order to absolve or discharge said Porter from his liability to the plaintiffs, as garnishee, if he were indebted to Pearce, it devolves upon him, Porter, to prove that the plaintiffs, or some person having power from them, or one of them, did discharge or release him, Porter, from his said liability as garnishee, to answer to the plaintiffs for debt or the debts he may have owed the said Pearce, or so much thereof as would satisfy the debt, &c., mentioned in the said execution.

3. That said Joseph Combs, as a licensed attorney at law, had no power or authority, *as such*, in behalf of the plaintiffs, to discharge said Porter, as garnishee, or to release him as such garnishee, as specified in said written release from him to said Porter.

4. That it devolves upon said garnishee to prove that said Combs had power and authority to make him, said garnishee, the release made to him by said Combs, and which was read in evidence to them.

5. That there is nothing upon the face of the release conducing to show that said Combs made the same in any other capacity than as attorney at law for the plaintiffs in the execution.

6. That if the jury find from the evidence that the note was assigned by Pearce to Sharp with an intent to delay, hinder or prevent said plaintiffs in the execution, from recovering their debt mentioned in the execution from said Pearce, and that said Sharp had notice or knowledge of such intent on the part of said Pearce, said assignment, so made by said Pearce, is void, as against the plaintiffs, if the jury find that plaintiffs were creditors of said Pearce at the time of said assignment.

7. That if the jury find that the note was assigned without a valuable consideration from Pearce to Sharp, and that plaintiffs were creditors at the time of such assignment, that then the said assignment was void as against the plaintiffs.

8. That the mere fact that an endorsement may have been made by Pearce to Sharp, purporting to assign said note, yet if the same were not delivered by said Pearce to Sharp and accepted by Sharp, with an intent thereby to transfer or to have transferred to said Sharp the debt

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mentioned in said note, but with a view to delay, hinder, defraud, or to prevent the creditors of said Pearce from the collection of their lawful demands of him, said Pearce, that then such assignment is void as against the plaintiffs.

The court gave the first and third and refused the others.

The defendant prayed the following instructions :

1. The answer of the garnishee is presumed to be true until the contrary appears from the proof, and the jury are bound to find the answer to be true unless it is proved to them by the evidence given in the cause that it is untrue.

2. The question for the jury is, whether the defendant was indebted to Pearce, at the time of the service of the garnishment, and not whether he was afterwards so indebted ; and therefore if the jury believe that the promissory note had been at the time of the garnishment assigned to Sharp, and was then in his possession under such assignment, they ought to find the issue in relation to the indebtedness, for the defendant, even if they should believe that after the garnishment and before the payment, the note had been re-transferred to Pearce, and was then his property.

3. The transfer of the note by Pearce to Sharp, was valid, so far as Porter is concerned, even if made without any consideration, and if the jury believe that the note was transferred before the garnishment, and was then in Sharp's possession, under the assignment, they ought to find their verdict upon the question of indebtedness, for the defendant, although they may believe that such transfer was made without any consideration whatever.

4. Upon the pleadings in the cause, the presumption is that Combs had authority to release the defendant, and it does not devolve upon the defendant to prove that he had such authority to warrant the jury in so finding, but they are bound to find their verdict upon the question of Comb's authority, for the defendant, unless it has been proved to them by the evidence in the cause that Combs had no such authority.

5. The jury are not to inquire whether, as between Pearce and Sharp, the assignment of the note was in good faith, or to defraud creditors ; if they find that it was assigned before the service of the garnishment, it was binding on Porter, and he was indebted to Sharp, and not Pearce,, and they must find the issue as to the indebtedness for the defendant, Porter.

The court gave the instructions and the plaintiffs excepted.

This proceeding was had under the eighth section of the act of 1835,

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to regulate executions, R. C. 254, which provides that "when a *fieri facias* shall issue and be placed in the hands of an officer for collection, if no sufficient property can be found in the county whereof to levy the amount due on said writ, it shall be the duty of the officer to summon, in writing, as garnishee, all such debtors of the defendant as the plaintiff, his agent or attorney shall direct, to appear in court at the return day of the *fieri facias*, to answer on oath such interrogatories as may be exhibited against him on the part of the plaintiff, touching his indebtedness to the defendant in the execution; and the like proceedings shall be had, and the like judgment rendered for or against the garnishee, as are or may be provided in case of garnishees, summoned in suits originating by attachment." In suits by attachment, when the garnishee appears by virtue of the summons served upon him, the plaintiff files his interrogatories, calling upon the garnishee to disclose the manner and amount of his indebtedness to the defendant. If he answers, admitting his indebtedness to the defendant, and the plaintiff is satisfied with the answer, the court will render judgment against the garnishee for the same; but if in his answer he denies any indebtedness, or does not disclose the full amount owing by him to the defendant, the plaintiff may by replication to the answer denying its truth, upon which an issue is made, which is tried as ordinary issues between plaintiffs and defendants.

In the trial of ordinary issues, the plaintiff is required to make out his case by showing his right to recover as alleged, and a defendant may fold his arms and take no steps in the cause until a *prima facie* case is made against him in his adversary. Then, according to the letter of the act, the answer of the garnishee is to be taken as true until disproved. But, we apprehend that the answer, being under oath, it is entitled to even more weight; and before a plaintiff can recover against an answer, he must disprove it according to the ordinary rule of disproving an answer filed to a bill of discovery, as this court decided in 8 Mo. Rep. 657, 9 Ib. 640, 10 Ib. 103.

The answer of Porter having disclosed the fact that the note executed by him to Pearce, was a negotiable note, and had been transferred by endorsement and delivery to Sharp, before the service of process on him—two questions are raised by him, first, whether a debt due by a negotiable note is subject to attachment in the hands of the payor; and second, whether the assignee should not have been brought before the court prior to any steps being taken against the maker.

To sustain the proposition that the promisor of the negotiable note

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cannot be garnisheed, and that no proceedings can be had against him, where it is disclosed by his answer, that the note had been transferred, without bringing the assignee before the court. We are referred to 4 Mass. Rep. 508; 13 Ib. 215; 5 N. Hamp. Rep. 502; 5 Ark. Rep. 55; 8 Mo. 660; 9 Ib. 382; 10 Ib. 374. The three first authorities referred to settle what the law is in Massachusetts and New Hampshire, and use very cogent reasoning to maintain its correctness; but what the statutes of these States are on the subject, or whether the decisions are made upon principles, and to facilitate the circulation of that description of paper, we are not advised. The other cases have no bearing on the question, being cases not of negotiable paper, but where an effort was made to attach assets of dead men's estates in the hands of their administrators, thereby impeding the speedy and due administration of the estates.

Whilst we are sensible of the difficulties that present themselves, in holding that debts, evidenced by negotiable paper, may be attached in the hands of the payor, to satisfy an execution debt of the payee, yet such appears to us to be the statutory provisions of this State, and so this court have decided in the case of *Scott & Rule vs. Hill & McGunnegle*; 3 Mo. Rep. 88, and *St. Louis Per. In. Co. vs. Cohen*; 9 Mo. Rep. 421; 3 Con. Rep. 27.

The statute prescribes no mode by which an assignee can be brought before the court, and have his rights litigated. But as the judgment is not conclusive against him, unless he has notice and chooses to come in and interplead, he would have a right, at any subsequent time, before the money was paid over to the attaching creditor, to arrest the payment, or after payment, a right to his action, to recover it back; we apprehend no very serious injury could result to him.

It is next insisted for Porter, that the release executed by Joseph Combs, as attorney for the plaintiffs in the execution, was authority for him to pay the note to Pearce. The circuit court instructed the jury that if Combs executed the release as the attorney *at law* of the plaintiffs, he exceeded his authority as such, and his release was inoperative. Attorneys at law being entrusted with the management of their client's causes, have necessarily extensive powers confided to them in the prosecution of causes to judgment, and after judgment, have a general direction and control of the execution, for the purpose of making the debt, but beyond this they cannot legitimately go; they have no right to compromise or compound, but where they are attorneys of record; they may receive the money on execution and their receipt therefor will

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be binding on their client. In receiving the money, they act within the line of their employment, which was to obtain the debt or damages for their client; 7 Ben. Monroe 126, § Cowen 386.

How, or in what capacity this adjustment took place between Pearce and Combs, whether Combs acted as attorney at law, or attorney in fact for the plaintiffs, was a question for the determination of the jury, but acting in either capacity, to make his act obligatory on the plaintiffs, it was necessary for him to have had special authority express or implied from them.

The next objection which we shall notice, is raised by the answer of Porter, and involves the question of the sufficiency of the service of the notice on him by the sheriff of Chariton county. The objection, as we understand it, is, that in the one and same notice, Porter is summoned as garnishee to answer different defendants in five several executions. That is, there were five executions in the hands of the officer at the same time, in favor of different plaintiffs, but against the same defendant, Pearce, and but one notice of garnishment served on Porter, in which he was required to appear before the circuit court of Cooper county, on the first day of the next term, &c., to answer such allegations and interrogatories as might be filed against him by the plaintiffs, (setting out their several names among which are the names of these plaintiffs) in five executions, touching his indebtedness to the defendant, Pearce.

The object of giving the notice was to have the garnishee before the court, and obtain from him a disclosure of his entire indebtedness to the defendant, and whether the amount owing by him to Pearce, was claimed by one or more plaintiffs, upon one or more executions, appears to be measurably unimportant, as it would in neither event increase his liability. This proceeding cannot, in this particular, be assimilated to the service of process in an original action, and subject to the same particularity and precision. We therefore regard the service of the notice as substantially good.

Inasmuch as the court denied, by its instruction, the right of the plaintiffs to show that the assignment from Pearce to Sharp was made without consideration, and for the purpose of hindering, delaying or defrauding the creditors of Pearce, its judgment ought to be reversed.

And the other judges concurring, the judgment is reversed and the cause remanded.

HANGER vs. IMBODEN.

HANGER vs. IMBODEN.

1. A had a contract with the post office department to carry the mail between two points: B agreed with him to carry the mail upon the route for a certain sum per annum. Upon a suit instituted by A against B upon this contract between them, held,
 - 1st, That a written contract signed alone by the Post Master General was competent evidence to prove that a contract existed between A and the post office department.
 - 2d. That a similar contract between B and the post office department *subsequently* made was not competent evidence.
2. The circuit court may properly permit a jury to take to their room written instruments read as evidence before them upon the trial.

APPEAL FROM WASHINGTON CIRCUIT COURT.

FRISSELL for appellant.

- 1st. The court below erred in not excluding from the consideration of the jury all the parol testimony relative to the terms of the contract between Imboden and Hanger after their written contract was introduced. 2 Phillips on Evidence 551 note 422.
- 2d. That there was no legal evidence in the court below that Imboden had contracted with the United States to carry the mail on route No. 3008, from Potosi to Van Buren. The paper introduced was at best a mere showing that the government was willing to contract with him for that purpose. If there was a contract this was not the best evidence of it. 2 Phillips Evidence 550 note 421.
- 3d. It was not pretended that there was any ambiguity in the contract between Imboden and Hanger, nor was it pretended that there had been any alteration of the terms of the contract. That was the only contract that had ever existed relative to the matter of carrying the mail upon that route.
- 4th. The court erred in permitting the jury to take to their rooms when they retired to consider of their verdict the papers which had been offered in evidence. Harkley vs. Hastie & Patrick 3d John 25. 2 Smith vs. Thompson 1 Cowen 221. Cornelius vs. Grant & Abbott, 8 Mo. Rep. 64.

JOHNSON for appellee.

- 1st. It was not necessary that Imboden's contract with the post office department should be signed by him. It was offered simply to show that Imboden had a contract for carrying the mail, the route, the compensation, &c. The department was bound by the signature of the Post Master General and this was as far as the defendant was concerned.
- 2d. The deposition of Hammond is conclusive in this case. The circuit court admitted it to be read after inspection. There was no evidence to show that it had been mutilated or altered. There is a natural commencement and the sense is clear. This was a matter for the circuit court alone to determine, and the original deposition is improperly here. Practice in S. C. sec. 21 p. 904 Rev. Stat. of 1845.
- 3d. The motion to exclude all parol evidence offered by the plaintiff was properly overruled. The written contract was offered in evidence by the defendants and not by the plaintiff. Besides the parol evidence was proper to explain the ambiguity of the written contract. Phillips Evidence with Hill & Cowens notes vol. 3 p. 1358 et seq p. 1361.

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4th. The circuit court may permit jurors to take with them when they retire to consider of their verdict such papers given in evidence as may be useful to them in making up their verdict. *Cornelius vs. Grant*, 8 Mo. Rep. p. 59. *Graham's practice* 274.

5th. When upon the whole record the judgment is for the right party it will not be reversed.

McBRIDE, judge, delivered the opinion of the court.

Benjamin Imboden brought an action of assumpsit in the Washington circuit court against Hanger and having obtained judgment Hanger moved for a new trial, which being refused, he excepted and appealed to this court.

The action is founded on a contract between the parties by which Imboden who had a contract with the general post office department for carrying the mail from Potosi, Mo., to Van Buren, Arkansas, for four years and a half, sub-let the same to Hanger at fifty dollars per year.

On the trial of the cause in the circuit court, the plaintiff read in evidence to the jury his contract with the post office department, dated 18th October, 1837, and signed alone by the Post-Master General, for carrying the mail on route No. 3008, for the sum of \$595 per year, payable quarterly. The contract in evidence was objected to because it was not signed by Imboden; but the objection was over-ruled.

Evidence was then given to prove the contract between the parties. Some of the witnesses stated that Hanger was to pay for the contract fifty dollars per year, others stated it was fifty-five, whilst others stated it to be fifty or fifty-five dollars for the whole term. It was in evidence that Hanger obtained a draft from the post office department sent to Imboden, and that when the draft was sold Hanger paid Imboden \$55 for the first year under the contract. It was further in evidence that the contract was worth \$50 or \$55 per year.

The defendant then offered in evidence a similar contract subsequently made by him with the post office department, for conveying the mail on the same route No. 3008, for the sum of \$499 84; which was objected to and excluded by the court.

It was in evidence that a change had been made in route No. 3008 by curtailing the service.

The defendant then gave in evidence the written contract between himself and one Inge, acting as the agent of Imboden, by which the defendant undertook to carry the mail from Potosi to Van Buren, on route No. 3008, once a week, conformable to the instructions of the post office department for carrying said mails; for which service he was to receive \$540, and be responsible for all losses; and then moved

HANGER vs. IMBODEN.

the court to exclude all oral evidence of the contract between him and Imboden; but the court refused the motion.

The jury were permitted to take to their room the contract of Imboden with the post office department, as also the contract between the parties; to which the defendant excepted.

The object of introducing the contract between Imboden and the post office department was merely to prove that a contract existed at the time of the sub-letting by Imboden to Hanger, and was competent for that purpose. The contract, although only executed by the Post Master General, was evidence that a contract existed and that Imboden was the contractor and entitled to the benefit of the contract.

The rejection of a similar contract between the defendant and the post office department, subsequently made, was, under the terms of the contract between Imboden and Hanger, properly rejected; because Imboden did not guarantee that the service would not be curtailed, and consequently the compensation reduced, (if that was the cause of the reduction,) nor is he liable because the contract between him and the department was annulled and a new contract made between Hanger and the department.

A new contract could only be made in one of two ways, either upon some condition reserved by the department in the contract which Hanger had purchased, or upon Hanger's failure to comply with the contract. In either event, if any loss accrued, it was the loss of Hanger.

If the new contract resulted from a change in the service and produced a reduction of \$100 in the compensation, still it may be presumed that the new contract was as profitable as the old. Whatever the department might legally do in the premises, Hanger took the risk in making the purchase: if the department has acted in violation of its contract with Imboden, Hanger, as assignee, is entitled to whatever damages may have been sustained by reason thereof.

But Hanger, holding the contract under Imboden, could not rightfully enter into any new contract with the department prejudicial to the rights of Imboden. If he had undertaken with the department to carry the mail on the route for \$100 per annum, still he would be liable to Imboden for \$55 which he had agreed to pay him.

We perceive no substantial objection to the court having permitted the jury to take with them to their room the contract between Inge, as agent of Imboden, and Hanger. They were both in evidence, and it is expected that the jury shall carry with them to their room the evidence in the cause, because it is by that they are to be governed in finding

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their verdict; and whether it consists in the written evidence of the parties or the recollection of the jury, appears to be wholly unimportant.

An objection was also taken to the reading of a deposition on the trial, but the bill of exception contains no deposition. What purports to be the original deposition objected to, has improperly been sent by the clerk to this court; whether it is the original deposition, the whole of it, or only a part, we have no means of knowing. Coming in this questionable manner, we are under no obligation to regard it, and certainly should not think of reversing the judgment for anything appearing on such a paper.

The deposition sent up was certainly very informally taken and certified; but if the objection was for that reason, the court below might very properly have overruled it. We apprehend that that court has a rule, or ought to have one, requiring objections of this character to be made prior to the calling of the case for trial; otherwise the opposite party might have his deposition, upon which he solely relies for a recovery, excluded, without the opportunity of having the irregularity corrected, or the cause continued and the deposition again taken.

Wherefore, for the foregoing reasons, the judgment of the circuit court ought to be affirmed, and, the other judges concurring, the same is affirmed.

MARSHALL vs. PLATTE COUNTY, TO THE USE OF JOHNSON.

1. A demurrer to any of the subsequent pleadings, brings up the sufficiency of the pleadings which have preceded the demurrer.
2. Where a demurrer to a plea is overruled, if the plaintiff does not obtain leave to withdraw his demurrer and file a replication, it amounts to an election on his part to stand on the demurrer; and the cause ought not to be tried, but judgment should be rendered for the defendant.
3. Where a county treasurer owns a warrant drawn upon a particular fund, and applies the money according to that fund in payment of his own warrant, to the exclusion of others presented, it is a legal disbursement of the fund.

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APPEAL FROM PLATTE CIRCUIT COURT.

LEONARD for appellant.

1st. The declaration is defective,, and for that reason the plaintiff's demurrer to the defendants second plea ought to have been overruled.

The suit being against the treasurer, and his sureties, must show a right to recover against all, principal and sureties. Here the sureties are only liable for official misconduct occurring under the appointment recited in the condition of their bond, and the declaration does not show that Marshall was treasurer under *that appointment* when the misconduct complained of occurred.

2d. There is a judgment in the record for the defendants below on the plaintiff's demurrer to their third plea, and the issue of fact on the first plea being found for the plaintiff, and the facts in the third plea being admitted on the record, and clearly sufficient in law to defend the plaintiffs right of recovery, the court erred in giving judgment for the plaintiffs on the whole record.

3d. The defendant Marshall had a right, when the relators warrant was presented to him for payment, to retain as a payment to himself, the amount due him on the Riley warrant. Where two warrants are presented at the same time by different persons, (and this must be considered a case of that kind) the officer, from the necessity of the case, has the right to elect which he will pay first, whether in point of fact the treasurer did apply the money in the treasury to the payment of his own warrant on the presentation of the Riley warrant, was a question for the triers of the fact, and although it may be that the proof not sufficient to make out such a state of the fact that did not justify the court in refusing to pronounce the law as required by the defendants third proposition.

4th. The treasurer had a right to retain against the county, and of course against a warrant of the county court an amount sufficient to meet his demand for services rendered the county. Here, the amount due the treasurer for these services, (as ascertained by the settlement of the 3d of July, 1844, subsequently made with the county court,) was \$140 06, leaving in the treasury of the \$178 22, a balance of \$38 16, applicable to the payment of the relators warrant, and establishing therefore the truth of the defendants third plea that at the time of the presentation of that warrant, there were not in the treasury applicable to that purpose, sufficient funds to pay it.

HAYDEN for appellee.

1st. That it was the duty of the treasurer, Marshall, to pay to the plaintiff his demand, due by virtue of his said warrant upon the treasury when the same was presented to him for payment, if there were money therein of the fund upon which the same was drawn sufficient to pay the same, and that his failure so to do was and is a breach of the condition of his said official bond.

2d. That the defendant, Marshall, had no right to refuse or neglect to pay the plaintiff the amount of his warrant out of the appropriate fund on which the same was drawn, if he had in his hands as treasurer of that fund money sufficient, even though said Marshall, as treasurer, may have been entitled to the sum audited and allowed him on the 3d of July, 1844, by the county court, or entitled to the claim for which the warrant had been drawn in favor of said witness, Riley.

3d. That the debt due the plaintiff, and for which his said warrant was drawn, is a debt due him from the county, and that the mere fact that the defendant was or may have been also a

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creditor of the county gave him, Marshall, no legal right individually to the money held in trust for the county as treasurer, nor could it have been held otherwise than in trust by him for the county, except it had been appropriated in satisfaction of his own demand, and in this case the debt allowed him of one hundred and forty dollars for his services as treasurer, was not audited or allowed by the county court until one day after the plaintiff's warrant had been drawn and presented to him as treasurer for payment; and after he as treasurer had written on its back *the falsehood*, that there was no money in the treasury applicable to its payment. Nor can he claim the money on hand at the time the plaintiff's warrant was presented for payment as being *his own funds*, upon the ground of having appropriated the same in satisfaction of the debt for which the warrant had been drawn in favor of said Riley, and claimed by him under a supposed assignment thereof by Riley. Because his own proof shows that he held the warrant as *his living and unextinguished warrant* against the treasury, down to the 5th day of March, 1847, when he credited the warrant with the interest which had accrued upon the whole sum, \$274, down to that time, at the rate of *ten per cent per annum*, amounting to the sum of \$95 95; so that it appears from the evidence that he most *faithlessly and fraudulently*, as an officer acting under the sanction of his official oath, and in violation of the condition of his bond, held, and has held *fast*, not only to the money due the plaintiff from the county, but also to his two warrants, one of which he obtained from Riley, at a discount or *shaving*, at the rate of fifteen per cent upon the gross amount, by falsely and fraudulently representing to him that there was no money in the treasury on the 5th day of September, 1843, thereby getting the warrant for about \$232 90, when, from *his own books* as treasurer, it appears that on the 4th day of September, 1849, the day before this warrant was presented to him for payment by Riley, he had in the treasury \$318 39, and no evidence showing that he had paid one dollar of it out, when he induced Riley to be *shaved* as above mentioned. This is not all; the evidence shows that on the 4th day of October, 1844, he, Marshall, endorses a credit on this warrant of \$111 53, just one month (less one day) after he had *skinned* Riley, which deducted from the two hundred and thirty-two dollars and ninety cents, which he paid for it, leaves just one hundred and twenty-three dollars and thirty-one cents, which was due him, (and so more, as his profits in the speculation, inures to the benefit of the county, he being a trustee,) this being the only sum due him on the 4th October, 1843, the interest thereon at ten per centum down to the 5th March, 1847, is the sum of about forty-two dollars and two cents, instead of ninety-five dollars and ninety cents, charged by him as due on account of this unholy speculation.

This is not all, it appears, from the proofs in the cause, that these credits being in *his own handwriting* have been erased, or partially obliterated from *his record book*, and from the warrant also; and no evidence given or offered by him why or wherefore the same was done, we are left to conjecture for the motive and from the other facts developed in the cause it is believed that any one can perceive it.

4th. The idea of the defendant having a right to set off a debt due him from Platte county against a debt which Platte county owes the plaintiff, and which Platte county through her *faithless agent* has refused and neglected to pay him, and thus in this case to excuse or justify him, defendant, for a breach of the condition of his bond, is too preposterous to deserve answer.

5th. That the circuit court ought not to have heard or received any evidence which was given by defendant to support his said special plea, and consequently done right in finding the verdict for plaintiff, and in giving judgment for plaintiff. There being no evidence or law authorizing a different verdict or judgment in the cause.

MARSHALL vs. PLATTE COUNTY.

McBRIDE, judge, delivered the opinion of the court.

This was an action of debt brought in the Platte circuit court, in the name of Platte county, to the use of James H. Johnston, against Frederick Marshall, the county treasurer, and his securities. the other defendants, to recover the penalty given by the ninth section of the act concerning county treasurers, for the refusal of the treasurer to pay a warrant drawn by the county court in favor of Johnston.

The declaration, after setting out the bond and its condition, assigns three breaches :

1. The presentation to the treasurer, at the county treasury, on the 2d July, 1844, of a county warrant of the same date, drawn upon the county expenditure fund, in favor of Johnston, the relator, for \$78 09, and a demand of payment thereof upon the treasurer, with his neglect and refusal to pay the same to the relator.

2. The second count is the same as the first, with the exception that the presentation was made at Platte City, in Platte county, instead of at the treasury, and the additional averment, that the treasurer endorsed on the warrant, presented and no money in the treasury.

3. The third count is the same as the second, except that the presentation is alleged to have been made to the treasurer without specifying at what place.

The declaration concludes with an averment that, at the time of the presentation of the warrants, there was \$600 in the treasury appropriated to county expenditures, and applicable to the payment of the warrants, and sufficient for that purpose : and that Marshall, "at the time the bond sued on was executed,—at the time the warrants were presented for payment, was, and still continues to be, treasurer of the county."

The defendant pleaded three pleas : 1st. *Non est factum.* 2d. *Nil debet.* 3d. That the alleged three warrants are one and the same warrant, and when presented there was no money in the treasury applicable to its payment ; and also gave notice of special matter : that at the time the warrant was presented, the county was indebted to him for services as treasurer in the sum of \$400, and in the further sum of \$274 as the owner by assignment of a county warrant of the 5th September, 1843, transferred to him on the same day.

The plaintiff took issue on the first and demurred to the second and third pleas, and the court sustained the demurrer to the second, but overruled it as to the third plea.

On the trial of the cause before the court setting as a jury, the plain-

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tiff read in evidence Marshal's official bond of the 6th September, 1841; also an order of the county court of the 3d July, 1843, allowing Johnston \$78 for his services, and directing a warrant to issue on the county expenditure fund for the same; and also the warrant on the treasury of the same date for the sum of \$78 09, with an endorsement thereon of the 2d July, 1844, in the handwriting of Marshall, and signed by him, "presented and no money in the treasury;" likewise the books and settlements of the treasurer from 1843 to 1845, for the purpose of showing the amount of money in the treasury applicable to the payment of county expenditures.

The defendants gave in evidence the order of the county court of the 3d July, 1844, allowing Marshall, for his services in keeping and disbursing the county funds, \$140 06, to be paid out of the county expenditure fund; also the order of August, 1844, allowing Marshall the further sum out of said fund of \$50, for keeping and disbursing the school fund; and also gave in evidence the county warrant of the 5th September, 1843, in favor of H. M. Riley, for \$274, payable out of the county expenditure fund, with the assignment thereon endorsed to Marshall, on the same day.

The plaintiff then read in evidence two erased receipts endorsed on the Riley warrant, one of the 4th October, 1843, for \$111 53, and the other of the 5th March, 1847, for \$95, and an erased entry in the handwriting of Marshall, in the treasurer's books of the 4th October, 1843, crediting the treasurer with \$111 53 paid on the Riley warrant.

This being all of the evidence pertinent in the cause, the defendants asked the court to declare certain propositions submitted by them, as the law of the case, but the court refused. The court found for the plaintiff. The defendants moved for a new trial, and in arrest of the judgment, and the motions having been overruled, they excepted and appealed to this court.

This case has heretofore been before this court, and is reported in the 10 Mo. Rep. 346. The questions now presented were not then before the court, but arise on the pleadings; we shall consider them in their order.

1. The plaintiff having demurred to the third plea of the defendants, the effect of his demurrer is to reach back to the declaration; for if the plea be defective, and the declaration also defective, the demurrer should be overruled as to the plea. It is a well established principle in pleading that a demurrer to any of the subsequent pleadings brings up the question of sufficiency of the pleadings which have preceded the

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demurrer, for the court will not give a party judgment who was the first to commit an error. 1 Chitty's Pl. 707.

The declaration alleges that "Marshall was at the time said writing obligatory, was executed (6th Dec., 1841,) at the time said warrant was presented by the said relator (2d July, 1844) and refusal of payment thereof made as aforesaid, and still continues to be treasurer of said county of Platte." Then, from the date of the bond to the time of presenting the certificate, nearly three years had elapsed, within which time one or more individuals may have been appointed and acted as county treasurer. If so, the facts averred in the declaration may be true, and yet the securities on the bond of 1841 would not be liable. It is the duty of the pleader to exclude by averment every reasonable doubt of his right to recover. It may be inferred, from the averments in the declaration, that Marshall was, at the time when the warrant was presented for payment, acting under his appointment of the 6th December, 1841, but it would be a mere inference, which might or might not be correct. If, however, no other objections existed to the pleadings, we would hesitate to reverse the judgment on this point.

2. The third plea of the defendants presented a bar to the plaintiffs recovery; at least, it was so adjudged by the circuit court, in overruling the plaintiffs demurrer to the plea. The plaintiff not having obtained leave to withdraw his demurrer and file a replication to the plea, it amounts to an election on his part to stand on the demurrer, and judgment should have been rendered for the defendants thereon. How then is the plaintiff to have judgment? It would be an anomaly in judicial proceedings for one party to have a judgment upon the law, and the other party to have a judgment upon the facts of the case. The defendants, by the pleadings, were clearly entitled to a judgment, the law having been found for them by the court; consequently, it was futile in the court to try the cause, and error to render judgment after the trial for the plaintiff.

As this case will be remanded, it may not be amiss to notice an instruction asked by the defendant and refused by the court. It is as follows:

3. That Marshall had a right to retain in his hands the amount of the warrant he purchased of the witness, Riley, that was due said Marshall at the time said warrants were presented to him, before he was bound by law to pay off said warrants or any parts thereof.

This instruction should have been given, not on the principle of offset, as held in the first and second instructions, but as a disbursement of so

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much of the county funds in the hands of the treasurer, provided it was applied by the treasurer in that way.

For the foregoing reasons, the judgment of the circuit court ought to be reversed, and, judge Scott concurring, the same is reversed and the cause remanded.

NAPTON, judge.

Upon the second and third points noted by the court, I do not concur. That the court might have entered judgment upon the demurrer against the plaintiff, is clear, but this was not done; and the trial of the issue presented by the third plea is sufficient to show that the case was proceeded in as though a replication had been filed and an issue made up.

The instruction complained of is, no doubt, law, but there was no evidence in the case to which it could be applied. It was proved that Marshall held up the Riley warrant and was charging interest upon it long after the period when the plaintiff's warrant was presented. It was perfectly immaterial, then, what might be Marshall's right to retain money upon the warrant he purchased of Riley, inasmuch as he did not do so, and there was no evidence tending to show that he did. On the contrary, the endorsement of the receipt of interest on this warrant, long after the plaintiff presented his, is conclusive to show that it was not so liquidated.

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CRAIG vs. CALLAWAY COUNTY COURT.

1. Payments of interest by one of several joint obligors in a bond, before the statute of limitations attaches, takes it out of the statute as to the others.
2. A bond made payable to the justices of the county court, by their names, for the use of the county, should be sued upon in the names of the surviving justices to whom it was executed: Choses in action do not go in succession.
3. A co-security not a party to the suit is a competent witness against his co-security.

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CRAIG vs. CALLAWAY COUNTY COURT.

APPEAL FROM CALLAWAY CIRCUIT COURT.

SHELEY & JONES for appellant.

1st. The bond having been made payable to the present plaintiffs in their official capacity, suit should have been commenced in the name of the present justices of the county court.

2d. In order to take a case out of the statute of limitations, there must be such a promise, coupled with the original consideration, would create a new and subsisting debt. 6 Mo. Rep. p. 21.

3d. The promise or undertaking of one of two joint obligors, will not take the case out of the statute of limitations as to the other. Hathaway vs. Haskel, 9 Pick. R. 42; Exeter Bank vs. Sullivan, 6 N. H. Rep. 124; Bell vs. Morrison 1 Peters Rep. 356, 374; Kelly vs. Sanborn, 9 N. H. Rep. 46; Story on contracts, side page 708; 5 Greenleaf 140; 17 Serg & Rawle 126, 29, 4. Daniel Nolly, being a co-obligor, and treasurer of the county, was an incompetent and illegal witness, being interested in the event of the suit.

5th. The indorsement upon a bond or note by the obligee or holder, that payments had been made thereon, is not in evidence as against the obligors.

REED & HARDIN for appellee.

1st. The motion to dismiss this cause from the docket was properly overruled. The general principle of the common law is, that no other person than the obligee in the bond can be the nominal plaintiff. The legal interest in the bond having been vested in Conger and Craig, the action must be brought in their names. I Chitty's Plead. 2, 3. The statutes of this State provide however, that such suits may be brought in the name of the county, or of the person to whom the bond was made for the use of the country. Either mode may be adopted at the discretion of the person having control of the action. Rev. Code 1845, p. 289-90, sec. 3, 4.

2d. Daniel Nolly is a competent witness for appellees. Although co-security with appellant, he is no party to the record; and in testifying for appellees, he testifies against his own interest. Upon the recovery and payment of the judgment, he will be liable to appellant for contribution. But he was admitted to testify under the provisions of this statute of practice at law. Revised Code 1845, p. 833-34, secs. 26, 27. It has already been determined that he could be used by appellees under the provisions of this statute. Callaway county court vs. Craig, 9 Mo. R. 846.

3d. The endorsements on the bond of payments of interest, were properly admitted in evidence. Appellees had no personal interest in the debt. The bond was executed to them as officers of the county court. If they had any interest, however, their remedy was not impaired by the statute of limitations at the date of the endorsements. Hence there was no inducement for them to cause false endorsements to be made. But Nolly states that the endorsements were made on the days they bear date. He was county treasurer and as such officer held the bond, and was the proper and only person that could receive and endorse payments. From these considerations, the court sitting as a jury might readily infer the fact of actual payments of interest. 1 Greene Evidence pages 138-39, 148-53; 17 John's Rep. 181 Roseboom vs. Billington; 2 Campbell 321; Rose vs. Bryant 32, Eng. Com. Law 175.

4th. If any legal objection could be taken to the question asked of the witness Henderson, the evidence thus drawn out could have had no weight, the court sitting as a jury, for it was in effect excluded from their consideration by the refusal of the 4th instruction of appellees.

5th. Payments of any part of interest or principal by one of several obligors in a bond or

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note before the statute of limitations attaches will prevent the statute from running as to the others. Whitney vs. Whitcomb Douglass 629; Sigourney vs. Druny and others 14 Pick R. 387.

6th. The promise of one out of several obligors of a note or bond before the statute of limitations attaches to pay the debt, takes it out of the statute as against the others and may be given in evidence on a separate action against any of them, although he has made no promise, and only signed the instrument as surety. Douglass 629; 9 Eng. Com. Law Rep. 413; Johns Rep. 3; 2 Pick. 581; 4 Pick. 381.

SCOTT, judge, delivered the opinion of the court.

This was a suit begun before a justice of the peace on a bond executed by N. Craig and Daniel Nolly as sureties for John H. Cook, payable to the justices of the county court for Callaway by their names, and for the use of the county. The suit was brought in the names of the surviving justices to whom the bond was given. These justices were not in office at the beginning of the suit. The defence was the statute of limitation. To repel the bar of the statute D. Nolly, the co-security, and who was no party to the suit, and the treasurer of the county was introduced as a witness, who proved the endorsements of the payment of interest on the bond before the expiration of the time in which suit might be brought on it. The endorsements were made by the witness on Cook's account. Nolly was objected to as an incompetent witness. A paper called a bill of discovery, sworn to by N. Craig was read in evidence by which the whole case is entirely made out. This paper was objected to as evidence by Craig, but no objection was specifically stated.

The instructions will not be noticed as they do not affect the case, which was argued, and evidently turns on the effect of the partial payments made by Cook in removing the bar of the statute of limitation.

This case is distinguishable from those of Bell vs. Morrison 1 Pat, and Levy vs. Cadet 17 Ser. and R. In them it was held correctly that after the dissolution of a partnership, there was no authority in one partner by an acknowledgment to revive a debt barred by the statute of limitations. It will be observed that in both of these cases the admission was not made by the part payment of an existing debt not barred, but by declarations. Although there is no authority in a partner to revive a debt after a dissolution, yet there is both a legal and moral obligation resting on a debtor to pay his debt before it is barred by the statute. In the one case a man acts voluntarily and without authority, in the other, under obligation, does what he has promised to do, and for the performance of which his surety is liable. Greenleaf says, 1 vol.

CRAIG vs. CALLAWAY COUNTY COURT.

sec. 174, the act of making partial payments within six years, by one of several joint makers of a promissory note, takes it out of the statutes of limitations. This, he observes, though much discussed, and sometimes questioned, seems now to be clearly established. A case has not been found which would warrant us in holding that a partial payment before the statute attaches is not a bar. The Code Napoleon expressly provides that the acknowledgment of the principal debtor shall interrupt the prescription against a surety. So our Statute provides that nothing in the act requiring a written promise to revive a debt barred by the statute shall in anywise impair the effect of a partial payment of a debt made by any person. Thus giving a legislative sanction to the rule. The neglect or omission of a creditor to sue his principal debtor does not relieve the surety. It is the duty of the surety to see that the debt is paid, for which he is bound. He knows that on his faith credit was given. Courts will not, by construction enlarge the liabilities of sureties. But every consideration forbids the indulgence of niceties by which they may be discharged from the responsibilities to the ruin of those who gave credit on their undertaking, and but for whom the credit would never have been given. We sympathise with sureties, who pay debts for which they have received no consideration, but those who are enforcing the collection of such debts are but repossessing themselves of what, on all principles of right and justice, belongs to them, and should meet with no other embarrassments than those created by a strict regard to law and justice.

The 4th sec. of the act concerning counties, Dig. 290, shows the suit was properly brought in the names of the justices to whom the bond was payable. The mode adopted was in conformity to general principles. Choses in action does not go in succession.

Daniel Nolly was competent. He admits himself to occupy the same position upon the paper that Craig does: in aiding a recovery against Craig, he therefore acts in opposition to his own interest; for a recovery against Craig will authorize him to call upon Nolly for contribution. When a paper is offered in evidence, if any objections exist to admissibility, it has been frequently held by this court that such objections must be stated specifically, otherwise they would not be noticed in error.

Judge Napton concurring, the judgment is affirmed.

McBRIDE, judge, dissenting.

The evidence in the case shows that although the bond in suit had

CRAIG vs. CALLAWAY COUNTY COURT.

been executed and due near fourteen years before the institution of the action, yet interest had been paid thereon by Cook, the principal, within the last ten years, and that a short time prior to the commencement of the action, Cook admitted that the bond had not been paid and promised to use exertion to pay it. Now, how far do the acts of Cook affect the legal rights of Craig the defendant. Craig is entitled to the benefit of the statute of limitations unless the payment of interest by, or the admissions of Cook can be made to attach to Craig and take the case out of the operation of the statute as to him also.

I find from an examination of the authorities that however the question might be decided, the decision would not be unsupported by high authority; for the courts in England and in this country have, at different periods of time, entertained different opinions on the subject. This court is therefore left free to decide the question according to the principles of right and justice.

A reference to some of the adjudged cases will show the conflict of opinion above intimated. The first case deserving of notice is that of Whitcomb vs. Whiting, 2 Douglass R. 652, and which may be regarded as the basis of all the subsequent similar adjudications on the subject. The action in the case was assumpsit on a promissory note. Plea, the statute of limitations. The plaintiff to sustain his action, produced a joint and separate note executed by the defendant and three others; and having proved payment, by one of the others, of interest on the note, and part of the principal within six years, insisted that such payment took the case out of the statute as to all the makers; and Lord Mansfield held "that payment by one is payment for all, the one acting virtually as agent for the rest; and in the same manner, an admission by one is an admission by all; and the law raises the promise to pay when the debt is admitted to be due. 2 Stark Ev. 896; 2 Pick 581; 3 ib. 291; 6 Johns 267; 15 ib. 3; 2 H. Bl. 340; 1 Taunt 104.

This enunciation, made by so distinguished a jurist, has been adopted by many judges; whilst others, regarding the principle repugnant to reason and justice, have refused to follow it. Of this latter class, is the supreme court of the United States, which in the case of Bell vs. Morrison et al repudiate the doctrine held in Whitcomb vs. Whiting. After reciting the opinion delivered in this latter case, the court say, "this is the whole reasoning reported in the case, and is certainly not very satisfactory. It assumes that one party who has authority to discharge, has, necessarily also, authority to charge the others; that a virtual agency exists in each joint debtor to pay for the whole; and that a virtual agency exists by analogy to charge the whole. Now, this

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very position constitutes the matter in controversy. It is true, that a payment by one, does enure for the benefit of the whole; but this arises not so much from any virtual agency for the whole, as by operation of law, for the payment extinguishes the debt; if such payment were made after a positive refusal or prohibition of the other joint debtors, it would still operate as an extinguishment of the debt, and the creditor could no longer sue them. In truth, he who pays a joint debt, pays to discharge himself; and so far from binding the others conclusively by his act, as virtually theirs also, he cannot recover over against them, in contribution, without such payment has been rightfully made, and ought to charge them."

"When the statute has run against a joint debt, the reasonable presumption is that it is no longer a subsisting debt; and therefore there is no ground to raise a virtual agency to pay that which is not admitted to exist. But, if this were not so, still there is a great difference between creating a virtual agency, which is for the benefit of all, and one which is onerous and prejudicial to all. The one is not a natural or necessary consequence from the other. A person may well authorize the payment of a debt for which he is now liable; and yet refuse to authorize a charge, where there at present exists no legal liability to pay. Yet, if the principle of Lord Mansfield be correct, the acknowledgment of one joint debtor will bind all the rest, even though they should have utterly denied the debt at the time when such acknowledgment was made."

To this reasoning of the supreme court of the United States, it may be replied, that the point discussed, did not arise in the case, and hence, what is there said is not entitled to that respect which under other circumstances it should receive. Although the question before that court was one involving the power of one co-partner, after the dissolution of the partnership, and after the statute had run, to revive the debt against his co-partner by an assumpsit on his part; yet, the case commented on, was in its leading facts, similar to the case now before this court; and besides, if the principles held in the case of Whitcomb vs. Whiting, is not applicable to partners, I can discover no reason why it should be applied to joint promissors. Indeed, there is more propriety for its application to partners, who are regarded in law, in many instances, as but one person, than to joint obligors, who are wholly unconnected in every other respect. One partner may, by his own individual act, bind his co-partner in an original undertaking, and I apprehend, that he may, by his promise to pay a debt barred by the

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statute, render his co-partner also liable; but after the dissolution of partnership, they cease to sustain the relation which conferred that power, and become as other joint obligors, each having to act for himself. Now, joint obligors have not the power of binding each other in the first instance, and upon principle, one should not have the power of continuing the liability of his co-obligor, after its termination by operation of the statute.

I am aware that a distinction is taken by some, between a case, where the statute has not run before the payment of interest, and where the payment of interest is after the debt is barred by the statute; but to my mind there is no difference in principle, for in each case the right is claimed of holding a co-obligor liable, and bound by the acts of another. This is what I deny; whether done before or after the statutory bar.

I find a case reported in the 6th N. H. Rep. 124, where the opinion of the court so fully meets my views, that I will here transcribe a portion of it:—"Those who hold that an acknowledgment or partial payment of the debt, by one, may take the case out of the statute, as to all the joint debtors, found their opinion on the ground, that the bar created by the statute, rests entirely upon the presumption, that the debt has been paid, and that such acknowledgment or payment removes the presumption, and revives the original promise. And they conclude, and if this be a correct view of the subject, very justly conclude, that in this, as in either cases, an acknowledgment by one, of many, who are jointly concerned, is evidence against all, sufficient to remove the presumption of payment. This is the explanation given by Best. C. J. in *Perham vs. Raynald*, 2 Bingham 306. And this is the explanation given by Lord Mansfield, in Douglass 652. He says "an acknowledgment by one, is an admission by all, and the law raises the promise to pay, when the debt is admitted to be due."

"It is not known that any other explanation has ever been attempted." 8 Mass. 134.

"But, if this be the true construction of the statute of limitations, it is clear that many cases, which have been overruled as not law, in latter times, are founded on true principles. For, if the admission of the debt takes the case out of the statute, it ought to do so, even if he, who makes the admission, declares at the time, that he will never pay. It is wholly immaterial what his intentions may be. He admits the debt, and this removes the presumption of payment."

"Those who hold the opinion, that an acknowledgment of the debt, by one, does not take the case out of the statute as to another joint prom-

CRAIG vs. CALLAWAY COUNTY COURT.

issor, rest their opinion on the ground, that an acknowledgment of the debt, does not, in any case, take a case out of the statute, and, that it is only evidence of a promise, which may revive the debt, but not the original promise."

"The principle, that an acknowledgment of the debt is only evidence of a new promise, has often been recognized by this court. 2 N. H. Rep. 425; 5 Ib. 154; has been adopted by the supreme court of the United States, 1 Peters 351,—by the supreme of court Mass., 8 Pick. 206,—by the supreme court of New York, 15 Johns 511,—and by the supreme court of Pennsylvania, 5 Binney, 573."

"It seems to be now becoming the general opinion, that an acknowledgment of the debt, that will warrant the finding of a new promise, must be an unqualified and direct admission of a present existing debt, which, the party is liable and willing to pay. If the debt be admitted, but the debtor at the same time refuses to pay, no promise can be raised by implication. The acknowledgment or new promise is not deemed to be a continuance of the original promise, but a new contract, supported by the original consideration, or evidence of such a contract."

This view of the operation of an acknowledgment of the debt, is believed to be conformable to the general current of the English, as well as of the American decisions, and has been explained and enforced by Mr. Justice Story, in a most able and satisfactory manner. 1 Peters, 351.

"If then, the admission of a debt does not, of itself, take the case out of the statute, but is only evidence of a promise which may have that effect, the principle, that an acknowledgment by one joint debtor will take the case out of the statute as to another, falls to the ground; there is nothing left to support it. For, although one joint debtor may admit the fact of the existence of the debt, which admission will be evidence of that fact against another joint debtor, still, it by no means follows, that, by such admission he can raise a new promise that will bind another joint debtor. It is not pretended that one can make a new contract, in such a case, that will bind the other."

"The admission may prove against all, that there is a just debt that has not been paid. But it can go no further. This is not enough. Before a new promise can arise, it must appear, not only that there is a subsisting debt, but that there is such a debt, which, the party to be charged, is willing to pay. The admission of a debt by one does not furnish any ground to presume that another is willing to pay. If an acknowledgment of the existence of the debt by one, can furnish a

CRAIG vs. CALLAWAY COUNTY COURT.

ground to presume a promise by another in his absence, it may do it in cases, where the other, if present, would refuse to pay. Indeed it may do it in a case where the other has actually paid the debt. In the case of *Cambridge vs. Hobart*, 10 Pick. 232, a distinction is made between an admission made by a sole debtor, and one made by one of several debtors. And where one of two makers of a note, many years after the note was given, said he presumed that it was not paid, it was held that this was not enough to take the case out of the statute as to himself, because, under the circumstances, it had very little tendency to rebut the presumption of payment, arising from the lapse of time. This distinction seems to us, to show that the old rule can rarely be safely applied in any case."

"When there is only one debtor, he must know whether the debt is paid or not. But where there are several debtors, there may be payment by one, without the knowledge of the rest."

"If one joint debtor admits that he owes the debt, and says nothing to the contrary, it may be inferred, from his silence, that he is willing to pay. But his silence can furnish no ground to presume that another who is absent, is willing to pay."

"If one debtor promises to pay when he is able, does this take the case out of the statute as to another, who is able to pay? It is as clear an admission of the debt as can be made. But if it take a case out of the statute as to the other, it may do it, in case where he who makes the admission does not take the case out of the statute with respect to himself."

"We are, on the whole, of opinion that a payment by one joint debtor, does not take a case out of the statute as to another; that the rule which has given that effect to such a payment, cannot be sustained upon principle."

Although in the opinions delivered, no argument is predicated upon the fact, that the obligations sued upon, were according to the principles of the common law, joint, and not joint and several, yet such may have been the case, and hence the idea, that the admissions of one joint obligor, must control and govern the rights of all the obligors. But, under our statute, no such pretence can find any foundation upon which to base such a principle. The obligation, if joint in its terms, would be held to be several also, and the obligee could maintain an action against any number of the makers.

For the foregoing reasons the judgment of the circuit court ought to be reversed.

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TAYLOR vs. LARKIN, ASSIGNEE OF BLOCK.

TAYLOR vs. LARKIN, ASSIGNEE OF BLOCK.

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1. To constitute a former judgment a bar to a subsequent suit, it must appear to have been a decision upon the merits of the case:—a judgment of non-suit is not a decision of the merits, and is no bar to a second action for the same cause.
2. A blank endorsement of paper *not negotiable*, is a mere authority to the holder to fill it up, but until this is done, the legal title remains in the payee.
3. A justice of the peace before whom a cause was tried, is a competent witness to prove the grounds upon which the cause was determined.

APPEAL FROM ST. GENEVIEVE CIRCUIT COURT.

FRISSEL for appellant.

To reverse the judgment of the court below, the plaintiff in error relies upon the following points:

That a judgment of a court having jurisdiction of the parties and the subject matter in controversy, is conclusive until reversed; and that evidence to show that the trial was not upon the merits is not admissible. 1 Phillips on Ev. 321; Bernard & Flanders, 12 Ver. Rep. 657; 9 Mo. Rep. 792; Callahan vs. Griswold, 1 Greenleaf, 596 note; Pike vs. Hill, 15 Vermont 183.

That if admitted in any case, the magistrate who rendered the judgment cannot be admitted to show a different state of facts from what his entries upon his docket shows.

That the court gave illegal instructions to the jury in behalf of the plaintiffs below, and refused to give proper and legal instructions asked for by the defendant.

COLE for appellee.

The plaintiff submits the following points:

1st. That at the time of the commencement of the actions before Hays, justice of the peace, on these notes, the legal interest therein was not in plaintiff, neither had he a subsisting cause of action in them until after the termination of said suits before the justice.

2d. In order to bar a recovery on the part of Thomas H. Larkin in this case, it was surely necessary to show on the trial before the justice on the part of defendant, that he, Larkin, had the legal interest in the notes in suit.

3d. Upon the trial the legal cause of action was in Morris Block.

4th. Larkin's subsequently acquired right to these notes cannot be prejudiced by the proceedings before the justice which could only affect him if he then had title; but having none, he could be deprived of nothing.

5th. The interference by counsel to prevent the justice from filling up the blank endorsement on the trial, had an ugly squinting towards an attempt which might in the end deprive Larkin of a just debt.

6th. The defence, then, it is contended, presents no bar: indeed, if it was otherwise, the *bad Rep.* shadow would take the place of the substance.

7th. Hays' testimony is pertinent, and does not impugn the record, neither vary or contradict. He relates the incidents that transpired before the suits were brought, the point made by the counsel in defence, his desire to obtain a confession of judgment so as to save costs, and finally that the judgment was not upon the merits but a non-suit, and therefore he permitted the withdrawal of the cause of action.

TAYLOR vs. LARKIN, ASSIGNEE OF BLOCK.

8th. The technical strictness of a common law court cannot be exacted of justices of the peace, who are mostly illiterate, we must therefore look to their good intention, and mould and shape them so as to answer the great ends of justice.

9th. There were some instructions asked by defendant and refused by the court to which there was an exception; but the principle I contend for renders them of no use, and the defendant could not be prejudiced by the refusal of the court to give them.

10th. I am aware of the rule that when the same subject matter has been fairly put in issue and once tried upon its merits, it cannot be again litigated. But this rule does not reach the case at bar. The case before the justice was not tried upon its merits; the merits were not fairly put in issue. The plaintiff had neither title nor merits. Block had both, and was not a party to the suit. The style of the suit before the justice, was a mere clerical mistake committed by the justice himself.

SCOTT, judge, delivered the opinion of the court.

This was a suit by petition in debt on three promissory notes, executed by Taylor to Morris Block, and by him assigned to the plaintiff. The notes were not negotiable. The defence was the plea of a former judgment for the defendant. Verdict and judgment for plaintiff.

Morris Block assigned the notes sued on in blank, and placed them in the hands of a justice of the peace, who brought two suits on them in the name of Thomas H. Larkin, assignee of Morris Block. The transcript of the justice states that the parties appeared and entered into trial, and the jury rendered the following verdict: "We, the jury, find for the defendant." The transcript continues: "Therefore the court does now here consider and adjudge that the defendant do have and recover his costs and charges of and against said plaintiff in this behalf expended, and that he have execution thereof, and leave is given plaintiff to withdraw his action."

The plaintiff in the action was defeated not on the merits, but because the assignment was in blank.

The justice of the peace was examined, from whose testimony the foregoing facts are ascertained.

There is no doubt that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea or bar; or, as evidence conclusive, between the same parties, upon the same matter, directly in question in another court. But in order to constitute the former judgment a complete bar, it must appear to have been a decision on the merits; and this will be sufficient, though the declaration were essentially defective, so that it would have been adjudged bad on demurrer. But if the trial went off on a technical defect, or because the debt was not due, or because the court had not jurisdiction, or because of a

TAYLOR vs. LARKIN, ASSIGNEE OF BLOCK.

temporary disability of the plaintiff to sue, or the like, the judgment will be no bar to a future action.

These principles will settle this controversy. The justice improperly commenced the suit in the name of Larkin. The legal title to the instruments sued on was in Block, and not in Larkin. The blank assignment was a mere authority in any one to whom the notes were passed to fill it up, but until that was done, the title was in Block. Whatever may be the effect of a blank endorsement of negotiable paper elsewhere, the foregoing is well established law in this State as to the assignment of paper not negotiable. Wiggins vs. Rectors Exr.; 1 Mo. Rep. 338, (478.) Menard vs. Wilkinson, 2 Mo. Rep. 67, (92.)

The case, then, is simply this, a person gets in possession a note of mine and brings suit on it when he has no right to maintain it, and is defeated for that reason; and afterwards acquiring a right to the note, institutes his action. In such case, on no principle of justice can the defence of a former judgment for the defendant, be sustained.

Taking the whole entry of the justice together, we think it may be construed into a judgment of non-suit, which is no bar to a second action for the same cause. Justices are not skilled in the law. Their proceedings should be viewed liberally. The act, though informal, clearly shows it was intended as the entry of a non-suit. To require formal judgments from justices of the peace, would lead to a great perversion of law and justice.

There was no error in permitting the justice to testify. His evidence was admissible to show the grounds on which the cause was determined. New England Bank vs. Lewis, *et al* 8 Pick. If the testimony of the justice was out of the cause, all ground on which the defendant could stand, would be removed as it does not otherwise appear that there was a blank assignment on the notes on which the suits were instituted.

The other judges concurring, the judgment will be affirmed.

RALPH SMITH et al vs. ISAAC, WILLIAM, et al, of color.

RALPH SMITH et al vs. ISAAC, WILLIAM et al (OF COLOR.)

1. A purchase of trust property, by a trustee, at a very reduced price, carries fraud on its face.
2. A decree against the heirs of a fraudulent purchaser, should impose no penalty upon them for the improper conduct of their ancestor; but in adjusting the rights of the parties, the improvements made by the ancestor if equal to, should be set off against the rents and profits.

APPEAL FROM MARION CIRCUIT COURT.

WELLS, ANDERSON & DRYDEN for appellants.

1st. The appellants insist that the decree ought to be reversed because it is not supported by the evidence in the cause.

2d. We insist the decree should be reversed because the land sought to be recovered, is described in the bill and decree with so much uncertainty as not to be capable of identity.

3d. A third reason why the decree should be reversed, is that forty acres of the land to wit: S E of N E sec. 26. T 62, R 6, claimed in the bill, was expressly by numbers devised by Myers to Easton, for his own use; the devise insisted upon by Easton in his answer, yet the court decreed this forty acres to complainants.

4th. A fourth reason for the reversal of the decree is that the court ordered the payment of the money for the 28 acres sold to White, to be paid to the negroes, whereas by the terms of the will the proceeds of the sale of lands were never to go into the hands of the negroes, but were to be invested in other lands by the trustees.

5th. The decree should be reversed because it is rendered against Ralph Smith and Wm Duncan as administrators of Robert Easton, deceased, a relation that is nowhere averred upon record, or shown by the evidence, they sustained to Easton or his estate, but rests alone in assumption.

6th. If it was right to decree the lands to the negroes, it was wrong to give the rents and profits without a deduction for valuable improvements made by Easton, proved to be worth \$930. The rents are exorbitant in any view that can be taken of them.

GLOVER & CAMPBELL for appellees.

1st. Wherever a trustee is guilty of a breach of trust by the sale of trust property even to a bona fide purchaser, if the trustee re-purchase the same property the trust re-attaches on the property. 2 Story's Com. Equity 508.

Now the appellees insist that in the sale to Gray, the trustees committed a violation of their trust in several particulars, and

1st. In this, that they surrendered up the whole power of sale into the hands of Jack-This is admitted by them repeatedly in their answers, and indeed relied on as a matter of defense by them.

2d. In wilfully selling the property in dispute, at less than half the value of the same.

3d. If the said sale was not made purposely for less than the value of the land, then it was

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made under such circumstances of ignorance, carelessness and neglect, as constituted a breach of trust.

4th. The said trustees violated their trust in selling and conveying said property to Gray, without receiving any portion of the purchase money, or taking any security for the same.

2d. The trustees never were in a condition to purchase the property in dispute, having been at all times after the death of Jacob Myers, clothed with the trust for some purpose touching the same. The rule in equity is that a trustee cannot purchase the trust property from himself, and the same rule requires that his connection with the trust estate must be totally dissolved before he can purchase, otherwise the purchase may be avoided at the pleasure of the *cestui que trust*. 1 Story's Com. on Eq. 517.

The trustee cannot purchase till fully divested of his fiduciary connexion with the property. 2 John Ch. R. 261.

3d. The transfer from the trustees to Gray, and Gray to Easton, was an intentional fraud upon the beneficiaries, planned and devised for the mere purpose of getting the title out of the trustees and getting it into the individual

4th. Until Jack had designated some spot where he wished to live and where the money arising from the sale should be re-invested, the trustees had no power to sell. Wormley vs. Wormley, 8 Wheaton 422.

NAPTON, judge, delivered the opinion of the court.

This was a bill to set aside a conveyance alleged to have been made fraudulently. The facts upon which it was based, were these:

By the will of Jacob Myers, executed in 1834, his slaves, William, Isaac, Jack, and ten others were liberated, and made the devisees of all his lands, except his town lots in Tully, and forty acres in the north-east quarter of S. 26, T. 62, R. 6. These last were devised to his nephew, Robert M. Easton, and the said Easton and William Duncan, (who was son-in-law of Easton) were made trustees for the negroes. The will provided, that in case Jack, one of the liberated slaves, should wish to sell the lands and remove to other lands, the trustees should sell, and with the proceeds purchase other lands for the negroes, where Jack might prefer to live. The real estate thus bequeathed, consisted of about 464 acres of land, lying in the bottom of the river Mississippi, adjoining the town of Tully. On the 3d of August, 1836, Jack signed a written paper, which stated that he (Jack) had made arrangements with Thomas Gray for the sale of the estate devised by Myers to his negroes, and desired the trustees to convey to said Gray. On the 3d of September, 1836, Easton and Duncan conveyed to Gray for the consideration \$1,900. Within a week after this conveyance, it was agreed between Gray and Duncan, that the former should convey to the latter, upon the consideration of \$2,600; but afterwards, and on the 4th of October, 1836, at the request of Duncan, the conveyance was made to

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Easton, who thereupon paid the seven hundred dollars (the advance in the sale from Gray) to Gray. Easton took possession, made improvements upon the land, and continued in possession up to the filing of the bill, excepting about 28 acres, which he sold to White, one of the defendants.

In October, 1840, this bill was filed. Six of the negroes, beneficiaries under the will of Myers, are the complainants, making the trustees, Duncan and Easton, and White, the purchaser of the 28 acres, and the seven runaway negroes, including Jack, defendants. The bill charges that the conveyances from the trustees to Gray, and from Gray to Easton, were fraudulent, and the result of a preconcerted arrangement; that the land was sold for less than half its value, and that Jack's signature to the written paper, requesting the trustees to sell, was procured by imposition upon his ignorance or imbecility.

The answer of Jack details the particulars of the transaction so far as he was concerned, and intimates that he was under duress, or misled and deceived, in signing the paper addressed to the trustees. He insists on the fraud, and makes his answer a cross bill. The answer of the other negroes, defendants, admit the charges of the bill, and pray relief.

Easton's answer denies all fraud, and relies chiefly upon the written order of Jack, who, he seems to think, was authorized by the will to control him as trustee. Duncan's answer is substantially the same with Easton's. White answered and insisted that he was a *bona fide* purchaser, for valuable consideration, without notice.

At the June term, 1844, of the circuit court of Lewis county, the death of Easton was suggested, and a bill of revivor filed against his heirs. The heirs filed their answer, adopting that of their ancestor, Easton. Replications were filed.

At the hearing, the material evidence was in substance this: *Munday*, a witness for the complainants, was acquainted with all the parties, and proved the signature of Jack to the paper heretofore alluded to, upon which the parties relied for authority to sell. He had a conversation with Easton shortly after Easton had purchased, which he thus details: "Easton, I am afraid you have got into difficulty about that land, and you and your children will be lawing about it." Easton thought not. "You ought to help the old woman, Sally, who is sick and destitute, &c." Easton replied that Myers did wrong in giving the property to the negroes, and "damn them, I intend to cheat them out of every thing they have." This witness also heard Gray about

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the time of his purchase, say that he was not going to settle on the land, that he had bought on speculation, and had nearly completed an arrangement, by which he would make six or seven hundred dollars. Gray did not explain with whom this arrangement was made, but from the *laugh* of Gray at the time of the remark, the witness understood him to mean Duncan.

Several witnesses testified as to the value of the land in 1836. They varied in their estimates from eight to twenty dollars per acre. It appeared that land of like quality and in the same vicinity had brought as high as twenty-five dollars per acre. One witness had offered Jack \$2,300 in cash for the land, but Jack, upon consultation with Easton, had declined selling. Easton's improvements consisted of a barn, smoke house, fencing, horse mill, and distillery, which cost him about \$2,130, but were worth at the trial only \$930. Easton added sixty or seventy acres to the enclosed land, and cultivated about one hundred and thirty acres. Seventy acres of which had been enclosed and in cultivation before he took possession. The average rent for this land was \$1 00 or \$1 25 per acre.

At the March term, 1847, of the Marian circuit court, to which court the cause had been previously removed, a final decree was rendered. All questions as to proper parties, their appearance and mode of defence were raised, and by consent, a decree was entered on the merits. The court pronounced the sales of Duncan and Easton fraudulent and void, and declared the land still subject to the trust, excepting the twenty-eight acres which had been conveyed to White. The bill was dismissed as to White, and his title declared valid. The court further decreed that the complainants recover \$398 66, from the estate of Easton, that being the purchase money with interest of the land sold to White. The further sum of \$1,398 was also given for the rents and profits. The court directed new trustees to carry into execution the will of Myers, in relation to the trust lands.

The general principles by which the conduct of trustees ought to be regulated, are highly equitable, and obviously based upon sound sense, ordinary prudence and good faith. The general rule is that a party cannot purchase on his own account that which his duty or trust requires him to sell on account of another. He cannot be both buyer and seller. Nor can he do indirectly what the law prohibits him from doing directly. A purchase *per interpositam personam*, by a trustee or agent of the particular property of which he has the sale, carries fraud on its face.

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It is unnecessary to examine the subject further here; the application of general principles alone, will be sufficient to settle the merits of this controversy. The admitted facts of this case, aside from the testimony of any witness, are such as to carry conviction of some gross unfairness, unless satisfactorily accounted for by the trustees. The sale of this valuable tract of land, apparently without any notice, and certainly without any effort to invite competition, upon the bare request of the *cestui's que trust*, against the consequences of whose ignorance and improvidence these trustees were expressly appointed the protectors; the gross inadequacy of the price being clearly less than one half and probably less than one-third of the amount which a sale at auction upon the usual credit would have commanded. The absence of all the customary precautions to secure the purchase money, no notes or money being taken, nor any security required from the vendee:—the subsequent transfer from this vendee to one of the trustees, within a week after the sale, and at an advance of seven hundred dollars, and the second transfer immediately thereafter to the principal acting trustee, are circumstances carrying on their face such palpable marks of fraud and bad faith, that nothing short of the most clear and satisfactory explanations could account for. But the trustees make no attempt at explanation. Their answers contain general denials of fraud, and their sole reliance for a justification of their conduct, is in the paper writing signed by Jack. They would have us believe that they were mere instruments of Jack, subject to his absolute control, and bound by the will of Myers to obey his dictates, however unreasonable. If the trustees really entertained such an opinion, it was a remarkable instance of fatuity. The testator seems to have been aware of the helpless condition of that class of individuals to whom he was extending his bounty; he knew that their ignorance and proverbial improvidence, together with their degraded condition in society, subjected them to imposition from such of their superiors in condition and intelligence as had sufficient knavery to take advantage of their situation. He therefore interposed agents, or trustees, to protect them against their own imbecility, as well as against the knavery of others. It is true, that he left to these freed men, or to one of the most intelligent of their number, the right of selecting their place of residence.—of continuing to occupy the lands bequeathed to them, or of selling and investing the proceeds in other lands. But further than this, the trustees were not restricted. The time, mode and terms of sale were left to their discretion; nothing was said in the will in relation to these matters, but they were left to

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be governed by those principles of common honesty which would teach them that they were to exercise ordinary prudence, and take such steps as, without accident, would secure a fair price for the land. The idea that the mere directions of Jack were sufficient to compel them to take an inadequate price, or to sell to an irresponsible buyer, or to sell for cash when a credit sale would be most advantageous, or to sell without notice, privately, to any person whom Jack might designate, receives no countenance from any provision of the will. Such an interpretation would not be likely to suggest itself to any mind imbued with ordinary sagacity, unless where the "wish was father to the thought."

Without reverting to the details of the bill of exceptions, it will be seen from the general sketch of the evidence which we have given in the statement, that its tendency is rather to confirm the suspicions arising from the intrinsic character of the transaction, than to exculpate the trustees. It is therefore unnecessary that we should make any particular comments on the testimony. Nor do we deem it necessary to express any opinion upon the alleged contradiction in the answers of the trustees, or upon the weight to which Jack's answer is entitled. A minute investigation of these points would only lead to a confirmation of the opinion already entertained of the merits of the decree.

There are some particulars, however, in which we think the decree erroneous. One of these is probably an inadvertence in drawing up the decree. The forty acres of land devised to Easton, is embraced in the descriptive list given in the decree of the lands devised to the negroes. Although this mistake might not prove fatal to the title of Easton's heirs, it being the obvious intent of the decree only to pass the title of the lands devised to the negroes, it is better that the decree be corrected in this respect.

The decree for \$1,398 for rents and profits against Easton's estate, we also think erroneous. The evidence shows that Easton added about seventy acres to the farm. Whether this was timbered or prairie land, is not stated. If the former, the expense of clearing and fencing it must greatly exceed the amount of the annual rents for ten years; if prairie land, the expense of breaking and fencing ought to set off its estimated rent. The other improvements are estimated by a witness at \$1,800 or \$1,900. Their present value is supposed by the same witness to be something less than a thousand dollars. Now the annual rent of the land may be set down at an average of \$1 25 per acre, which would make the total rent of the seventy acres (in cultivation when Easton bought) about \$875. Equity does not require that any

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penalty should be visited upon Easton's heirs for the improper conduct of their ancestor, but that a fair and equitable pecuniary compensation should be decreed to the complainants for actual losses. This is effected, in our opinion, by the decree for the land and the purchase money and interest of the twenty-eight acres sold to White. The improvements should be allowed a set-off against the rents and profits.

As it will be necessary to appoint trustees to carry into execution the will, in respect to the trust property, we shall remand the case, in order that the decree may be amended in the particulars suggested.

The other judges concurring, the decree of the circuit court is reversed, and the cause remanded.

12	112
32a	226
12	112
56f	490
12	112
81a	102

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- Jone*
1. A mortgagee of personal property is, after judgment of foreclosure and before sale, regarded in law as the absolute owner; and may maintain an action of trover to recover the value thereof.
 2. On the 19th ~~July~~ 1838, A mortgaged certain slaves in controversy to B; the mortgage was recorded on the 18th July following; on the 25th May 1837, a distress warrant against A issued from the treasury department of the United States, which was levied by the Marshal, on the slaves, on the 15th November 1838: a sale of the slaves was made on the 11th June 1839; held,

1st. That the distress warrant could not become a lien upon the slaves until an actual seizure by the Marshal.

2d. That prior to an actual levy by the Marshal, A, the mortgagor, had parted with his title to the slaves.

3d. Therefore, the title of B, the mortgagee, to be good against a purchaser at the Marshal's sale.

APPEAL FROM WASHINGTON CIRCUIT COURT.

COLE for appellant.

1st. The appellee had neither a property general, nor special in the slaves Stephen and John, that would authorize him to recover in an action of trover.

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2d. A special property can only arise from possession and the appellee never at any time had possession of said slaves.

3d. A general property is a perfect right to the thing, coupled with possession, or an immediate right to the possession.

4th. It will be contended that, the failure of Jones to pay the mortgage debt did not nor could, under the peculiar phraseology of the mortgage deed, vest in appellee any title whatsoever to the slaves in issue.

5th. If there was however a right vested in consequence of Jones' default, yet the foreclosure of the mortgage by Davis, and judgment thereon, merged that right in a higher security, and the present action cannot be maintained.

6th. To divest Jones' right to the possession of the slaves under the mortgage, it was necessary to foreclose and to request a delivery in order to their sale.

7th. It will be insisted that the instrument called a mortgage, although it purports in its inception to convey title, yet in its subsequent part so qualifies the first by creating a trust in Davis so specific and precise in its character, that Jones' title cannot be divested, unless by a compliance with said mortgage according to its tenor and effect.

8th. There is no sufficient evidence of a conversion by appellant.

9th. It is insisted that the mortgage from Jones to Davis was without consideration, intended to defraud Jones' creditors and therefore void, and that the circuit court erred in excluding from the jury the evidence offered by appellant to prove the fraud.

10th. It will be insisted that appellant's title derived through the warrant of distress of the United States, against Jones, a defaulting and insolvent debtor, is better than a title to the slaves deduced from the mortgage although such mortgage was not tainted with fraud.

11th. The sheriff in his return on the special *fi fa* for the sale of the slaves in issue, returns that Stephen is not found but is silent as to John, non *constat* but he was found, and the verdict and judgment are consequently erroneous.

12th. The instructions given for plaintiff below were erroneously given by the court.

13th. The court below erred in excluding the evidence offered by appellant to prove fraud, the decision being adverse to an instruction given by the court, that fraud was a bar to plaintiff's recovery.

14th. The defendant's motion for a new trial, under the law and facts of the case ought to have been granted and the court erred in overruling it.

FRISSELL FOR APPELLEE.

The defendant in error insists that in this case the court below committed no error.

That the warrant of distress under which the plaintiff in error claims title being in derogation of common right must be construed strictly and its operation is not to be extended by construction.

That the recording the levy would create no lien on personal estate, because the law regulating the warrant of distress does not provide for recording such levy.

That there was no evidence given or offered tending to show any fraud in the mortgage to Davis either on the part of Jones or Davis.

That the attempt to prove a failure of consideration was fully rebutted (if any rebutting testimony were necessary) by the judgment of foreclosure of the mortgage. U. S. statutes at large 3 p. 592 3-4; 9 Peters 8, 19, 21, opinion of C. J. Marshall.

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McBride, judge, delivered the opinion of the court.

Davis brought his action of trover in the Washington circuit court against Dean to recover damages for the conversion of two slaves. Plea, not guilty: judgment for plaintiff: motion by defendant for a new trial, which was overruled, exceptions taken and the case brought up by appeal.

On the trial, in support of the issue the plaintiff read in evidence a mortgage executed by Augustus Jones and wife to Timothy Davis, on the 19th June 1838, duly acknowledged on the same day and admitted to record on the 18th July 1838, in the recorder's office of Washington county; by which the said Jones and wife conveyed the said slaves, together with a large amount of other property, to secure Davis in the payment of \$30,000. The mortgage, is in the usual form of such instruments, with the exception, that it provides the slaves shall be reserved until the other property be sold and then sold if an amount sufficient has not been made out of the other estate to satisfy the mortgage, debt, and costs; and that the slaves are to remain in possession of Jones until their sale shall become necessary as before provided. This mortgage was foreclosed by a petition filed for that purpose on 5th September 1843; upon which judgment was had on the 28th October 1845; execution on the judgment 3d December 1845, upon which, and two subsequent executions, the real estate conveyed in the mortgage was sold, and produced the sum of about \$600; there was also sold one negro man, named in the mortgage for about \$50—the other negroes not found by the sheriff.

Evidence was also given tending to prove that the negroes sued for, were in the possession of Jones, the mortgagor, from the year 1836 to 1842 or 3, after which they were in the possession of Dean the defendant. That one of the negroes was worth from \$500 to \$700, and the other worth from \$1200 to \$1500—that a demand was made of the defendant Dean for the negroes, prior to the institution of this suit, who refused to deliver them to the plaintiff's agent.

The defendant gave in evidence a record of the district court of the United States, with the endorsements and certificates thereon—being a distress warrant issued by the solicitor of the treasury against Augustus Jones and his securities, dated 25th May 1837, recorded in the office of the district court of Missouri on the 22 July 1837. By virtue of which the marshal of said district on the 15th November 1838, levied upon the

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negroes in question, and filed his said levy for record in the office of the clerk of the court for said district, on the 3d May 1839; and sold said negroes on the 11th June 1839; when James M. White became the purchaser at the sum of \$1539, and received possession of said slaves.

Next a mortgage from James M. White to the county of Washington, of certain real estate, and also the negro slaves in controversy, dated 6th August 1842, to secure a debt due by Jones as principal and White, Dean and McCabe as securities, to the county, for the sum of \$2,600, and interest thereon, the mortgage duly acknowledged and recorded. Then an order from the county court of Washington county, made at the November term 1843, directing the sheriff to levy and make the amount of the mortgage debt, out of the property therein specified; and the return of the sheriff showing that at the sale of the slaves in controversy John Dean became the purchaser thereof at the price of \$700. Sale took place 29th December 1843.

This was all the evidence given in the cause. The defendant offered to read in evidence, on the trial, the record and proceedings of a former suit brought by the plaintiff Davis against Jones, to show that the mortgage from Jones to Davis was fraudulent and intended to defraud creditors, and that Jones did not owe the debt intended to be secured thereby; but the court refused to permit the same to be read, and the defendant excepted.

The plaintiff asked and the court gave the following instructions to the jury:

1st. That the distress warrant given in evidence is not a lien upon the personal property until the same is levied.

2d. That the mortgage deed from Jones to Davis being prior in date to the levy of the distress warrant, and sale under it, is the elder and better title than the title acquired by the said sale, unless the said mortgage was fraudulent and contrived to hinder, delay and defraud the creditors of Jones.

3d. That if the jury find for the plaintiff, they should find the value of the property; and if they think right, lawful interest thereon, from the date of the conversion of the slaves to the present time.

4th. There is no evidence before the jury going to show fraud in the giving of the mortgage from Jones to Davis.

5th. That the mortgage from Jones to Davis having been acknowledged and recorded according to law, is notice to all subsequent mortgagees and purchasers, of the contents of the mortgage.

6th. The distress warrant of the United States against Jones did not

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create any lien or give any preference to the United States over the mortgage or conveyance given by Jones to Davis.

To the giving of which the defendant excepted; and the defendant thereupon prayed the following instructions to the jury:

1st. If the jury shall find from the evidence that the slaves in the plaintiff's declaration mentioned, were mortgaged to Davis, with a view to defraud Jones' creditors, then the plaintiff cannot recover.

2d. If the jury shall find that the said mortgage was given by Jones without consideration, or the consideration has failed, then they must find for the defendant.

3d. If the jury shall find, either expressly or impliedly that Jones was permitted by Davis to use said slaves as his own, or sell them or pledge them to another person, then their acts will amount to a waiver of his rights to the slaves and he cannot recover.

4th. If the jury shall find that Jones mortgaged the slaves at issue, to Davis, and Davis has since foreclosed the mortgage and awarded execution thereon, the said mortgage has merged in a higher security, and Davis has neither the absolute property in the slaves, nor a right to immediate possession, and cannot recover.

5th. If the jury shall find that the slaves were sold by the marshal of the United States, upon process that was prior in time to the mortgage, and afterwards Jones purchased said slaves, yet such purchase did not enure to the benefit of the mortgagee, but to Jones and to defendant who holds under him, and the jury must find accordingly.

6th. Unless the jury shall find that the right to the slaves is in Davis, and also a right to the possession of them at the bringing the suit, they must find for the defendant.

7th. If the jury shall believe the mortgage from Jones to Davis was gotten up for the purpose of defrauding creditors and others, then the mortgage is void and confers no right on Davis to the slaves in the suit.

8th. If the jury shall find that the consideration of this mortgage has failed, then the plaintiff cannot recover.

9th. That the purchase of the slaves at a judicial sale by Dean, was not a conversion, and unless the jury shall find that Dean was in possession of the slaves at the time when demanded, they must find for the defendant, for a refusal to deliver by Dean when not in possession is not a tortious act, and gives the plaintiff no cause of action.

10th. If the jury shall find that Dean purchased the slaves at a sale under an execution, yet this gave Davis no cause of action, unless the

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jury shall further find that Davis demanded of Dean the slaves, and that they were in his possession at the time the demand was made and that he refused to deliver them, and without the jury shall so find he cannot recover.

The court gave those numbered 1, 6 and 7 and refused the others; to which refusal the defendant excepted.

The first question we shall notice, is, the right of the plaintiff under the facts in this case to maintain the action.

This court have upon two occasions, Robinson vs. Campbell 8 Mo. R. 365 and 615, held, that after the day of redemption and prior to foreclosure, the mortgagee may maintain an action of trover to recover the value of the mortgaged property; because, the mortgagee, is regarded in law, as the absolute owner of the property. This is unquestionably a familiar principle of the common law. If therefore the legal title to the mortgaged property be in the mortgagee and he can bring an action of trover for its conversion, before foreclosure, no reason is perceived, why he may not maintain an action, at any subsequent time, before a sale under the decree of foreclosure, which alone divests him of title. It is true, that after judgment or decree of foreclosure, he may reach the property in whose possession the same may be found, by a special writ of *fieri facias* or order of sale, and subject it to sale for the payment of his debt; but if, as in the case at bar, the mortgaged property cannot be reached by the process of the court, but its possession can be traced to a stranger to the mortgage deed, it would be an anomaly in the law to hold that the mortgagee is without remedy. There is nothing in the reason of the thing, why the mortgagee may not after, as well as before foreclosure, have every remedy applicable to his case to enforce his rights. The judgment of foreclosure in his favor, cannot have the effect of divesting him of his title acquired under the mortgage; if so, where rests the title, after the decree, and up to the day of sale? It does not revert to the mortgagor, nor is it in the law officer, until the property comes into his possession. The title must, therefore, remain where the mortgage deed placed it, until a sale under the decree of foreclosure, when the title passes out of the mortgagee and vests in the purchaser at the sale. This view of the subject may be attended with some difficulties, but it is the only consistent one which we can take.

We shall next inquire which is the better title to the property in controversy, that of Davis who claims under the mortgage deed from Au-

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gustus Jones, or that of Dean, who claims title under White's mortgage to the county of Washington? White purchased the slaves at the marshal's sale made by virtue of a distress warrant against Augustus Jones, for a debt due from Jones as a defaulting officer of the general government.

It appears from the evidence that Augustus Jones had been marshal of the United States for the district of Missouri; and as such, had become a defaulter to the government, for which, the solicitor of the treasury issued a warrant of distress against his property, and the same having been levied on by the then marshal, the slaves in controversy were sold and purchased by White, and then mortgaged by him to the county to secure the payment of a debt due to the county by Jones and for which White was bound as one of his securities.

The mortgage deed from Augustus Jones and wife to Davis was executed and acknowledged on the 19th June 1838, and filed for record 18th July 1838.

The warrant of distress issued by the solicitor of the treasury department against Augustus Jones and his securities was dated the 26th May 1837. The first levy made under the warrant by the marshal was on the 24th June 1837; the next on the 19th July 1837, and the levies recorded in the clerk's office of the district court of Missouri on the 22d July 1837. On the 1st September 1837 a further levy was made by the marshal on the property of Jones, and the same likewise recorded on the 4th September 1837. All these levies were upon real estate.

On the 15th November 1838, an additional levy was made, embracing the negroes in controversy, which was recorded on the 3d March 1839. A sale was made of the slaves under the levy last made, which took place on the 11th June 1839, when James M. White became the purchaser and took possession under his purchase.

The act of congress which we suppose the defendant invokes to his aid, is found in the United States statutes at large 3d vol. page 592, entitled, "an act providing for the better organization of the treasury department, approved May 13, 1820. The 2d sec. of this act directs the manner of ascertaining the balance in the hands of public officers, unaccounted for, and authorizes the issuing of a warrant of distress therefor, directed to the marshal of the proper district, whose duty it is made to levy the same and collect the amount by a sale of the goods and chattels of the delinquent officer; if the goods and chattels be not sufficient for that purpose, the marshal is required to levy the warrant

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upon the body of the officer, and commit him to prison, there to remain until discharged by due course of law. Notwithstanding the commitment of such officer, or if he abscond, or if goods and chattels cannot be found sufficient to satisfy the warrant, the marshal is then directed to levy and collect the balance due thereon by distress and sale of the goods and chattels of the sureties of such officer.

The statute then provides that "the amount due by any such officer as aforesaid, shall be, and the same is hereby declared to be a lien upon the lands, tenements and hereditaments of such officer, and his sureties, from the date of the levy in pursuance of the warrant of distress issued against him or them, and a record of thereof, made in the office of the clerk of the district court of the proper district, until the same shall be discharged according to law."

From the foregoing it will be perceived that the lien given by the statute, applies only to the real estate of the delinquent officer and his sureties; and then only from the date of the levy and record thereof. No lien is pretended to be given by the statute, on the personal property of the officer, and if any exists, at any time, it can only attach from and after the actual seizure of the property by the marshal.

Prior to the levy on the slaves in controversy, by the marshal, under the warrant of distress, Jones, the defaulting officer, had parted with his title to the slaves, by his mortgage to Davis. Davis' title to the slaves being a perfect legal title, prior to the levy by the marshal, it could not be divested by such levy.

The only remaining question which we shall notice, is that raised by the defendant, in consequence of the rejection of the record offered by him in evidence, to prove that the mortgage was fraudulent. The record shows that proceedings had been heretofore instituted by Davis against Jones to recover the debt intended to be secured by the mortgage; and to that action Jones pleaded: 1st nil debit, 2d payment, 3d fraud in obtaining the bonds sued on, 4th failure of consideration, and 5th set-off. Replications were filed to those pleas. To support his defence Jones filed a bill of discovery against Davis, charging several of the matters alledged in his pleas and calling for a discovery from Davis. No answer was filed, but at the next term of the court thereafter, the cause was dismissed, by agreement at Jones' cost.

It surely cannot be seriously contended that such a record could prove any fact material between these parties now contesting title to the slaves in controversy. The pleas filed in the cause referred to, were doubtless the act of the attorney, and Jones most likely never saw

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them; the bill of discovery, at most, could only be regarded as the ex parte declarations of Jones; and the dismissal of the cause could raise no legal presumption of fraud in the subject matter of the suit, and more particularly where the dismissal is by agreement and at the cost of the defendant. The record then, not conducing in anywise, to impeach the consideration of the mortgage deed from Jones to Davis, was properly excluded by the court.

For the foregoing reasons the judgment ought to be affirmed, and the other judges concurring the judgment is affirmed.

SCOTT, judge.

The objection that an action of trover, cannot be maintained after a foreclosure, may have weight in a suitable case. But whatever may be its force, it is not applicable here, as the defendant in the action was no party to the proceedings to foreclose: as to him they were void, and therefore he can derive no advantage from them.

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- Upon the trial of a *qui tam* action, founded "on the statute to prevent the firing of woods, marshes and prairies;" evidence to prove that the land where the fire was set out belonged to the defendant is irrelevant.
- A person who sets fire around his own farm, does it at his peril: and if it occasions damage to another, he is liable under the statute, no matter what may have been his motive.
- The word "farms," as used in the statute to prevent the firing of "woods, marshes, and prairies," is not confined to enclosures.

APPEAL FROM BOONE CIRCUIT COURT.

STATEMENT OF THE CASE.

This was a *qui tam* action, by Finley, against Langston, in the Boone circuit court, to recover the penalty of three hundred dollars, given by the first section of the act of the 26th of January, 1835, against the firing of woods, marshes and prairies.

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The declaration charges that the defendant wilfully set on fire the two mile prairie, not occupied by him, with intent to burn the same, and thereby burned up the fences, grain and hay of three persons, Robards, and the two Wright's.

The cause was tried on the plea of *nil debit* at the last August term, when the defendant had a verdict and judgment, from which the plaintiff has appealed to this court.

Upon the trial it appeared in evidence that in the fall of 1844, the plaintiff, defendant, Robards and the two Wrights, lived on the two mile prairie in Boon county, that west of the defendant's field, and north of Mrs. Modes, which joined the defendants on the south, and extended west of it, there was a triangular piece of prairie cut off from the main body of the prairie by a drain five or six feet deep and wide, for the purpose of saving their farms from being burned. The defendant proposed to Mrs. Modes son to burn the grass off of this triangular piece of ground, and went out for that purpose; the wind, however, being too high, they desisted on that day, but two or three days afterwards went out again, and the defendant set fire to the grass, which spreading rapidly, burned up the rails, grain and hay of Robards and the two Wrights. Enoch Hughes owned the quarter section of land west of the defendants, so that the triangular piece of land before referred to, belonged partly to the defendant and partly to Mr. Hughes. This piece of land was occupied by the defendant for the feeding of his stock, and it was here and on that part of it that belonged to the defendant that the fire was put out.

Upon the trial the defendant offered to prove by a witness, Mr St. John, that the defendants fence was not on his line, and that his land extended beyond his fence, which was objected to by the plaintiff, and the objection being overruled, the witness testified that the defendant claimed land out side of his fence, but to what extent witness did not know.

Another witness, Mr. Mode, testified that the defendant claimed the land outside of his fence to a stone or stake about half way between the south-west corner of his field and the drain, which was also objected to by the plaintiff.

A third witness, Mr. McGuire, testified that the defendants farm was on the N E qr. of sec. 32, that some years since he ran the line between the defendant and Mode, and planted a stake at the S W corner of the defendant's land, which was three chains distant from his field and about half way between the field & the drain, and to this evidence the plaintiff also objected.

The plaintiff asked six instructions, as follows:

1st. That if the jury find from the evidence that prior to the commencement of this suit, the defendant, Langston, wilfully set on fire the said prairie in the declaration mentioned, and that the place where said defendant set the fire in the prairie was not on the farm of the said Langston, nor occupied by him, said defendant: and further find that the said firing of said prairie by said Langston occasioned any damage to the said Wm. Robards, Thomas Wright, and Samuel Wright, or to either of them by burning their or either of their property, as stated in the declaration, that then they are bound to find their verdict for the plaintiffs.

2d. That if the jury find from the evidence that the defendant wilfully set the prairie on fire outside of his own enclosure, upon his own land, and not on his farm, or occupied by him, with an intention not only to burn the same within and upon his own land outside of his enclosure, or land occupied by him, but also with the intent to burn the same upon the land of Enoch Hughes, situate adjacent to his own and not occupied by him, and further find that by such setting said prairie on fire he burnt the same as well upon his own as upon said prairie land of said Hughes, not occupied by said defendant, as also that the said fire did burn on and extend in its burning to the said lands of the Wrights and said Robards, and burned and damaged their or either of their property mentioned in the declaration that then they are bound to find their verdict for the plaintiff.

3d. That although they find from the evidence that defendant set the fire upon his own farm, yet if they further find that it was done with intent to burn the prairie adjacent to his own farm, and not at the time occupied by him, and that such burning did occasion damage

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to William Robards or Thomas and Samuel Wright, they must find their verdict for the plaintiff.

4th. That if they find for the plaintiff they cannot find a less sum than fifty dollars, nor a greater sum than three hundred dollars.

5th. That the word farm, as used in the statute sued on, means the land and ground occupied by defendant within his actual enclosure, and does not mean any land outside of the fences or actual enclosures of the ground by him, said defendant, occupied at the time of his setting the prairie on fire.

6th. That if the jury find from the evidence that the defendant wilfully set the prairie on fire outside of his own enclosure, upon his own land, with an intention not only to burn the same within and upon his own land outside of his enclosure or land occupied by him, but also with the intent to burn the same upon the land of Enoch Hughes, situate adjacent to his own and not occupied by him, and further find that by such setting said prairie on fire he burnt the same as well upon his own as upon said prairie land of said Hughes not occupied by said defendant, as also that the said fire did burn on and extend in its burning to the said lands of the Wrights and said Robards and burned and damaged their or either of their property mentioned in the declaration, that then they are bound to find their verdict for the plaintiff.

The court gave the first, second and fourth, and refused to give the third, fifth and sixth of said instructions,

The defendant asked three instructions, the first and second of which the court gave, and refused the third. They are as follows:

1st. Even if the jury find that the defendant set on fire the dead grass and that this fire occasioned to Robards and other persons mentioned in the declaration, the damage therein alleged, yet if they also find that the land where the fire was set at the time, was used and claimed by the defendant as a part of his farm, they must find for the defendant unless they further find that the defendant did the act complained of with intention to set on fire the adjacent prairie *not occupied* by him.

2d. The declaration charges that the defendant set on fire the prairie *not occupied* by him, and therefore the plaintiff cannot recover in this action unless the jury are satisfied from the evidence that the defendant did set on fire the prairie *not occupied* by him.

3d. Even if the jury find that the defendant set on fire the dead grass and that this fire occasioned to Robards and the other persons mentioned in the declaration the damages therein alleged, yet if they also find that the land where the fire was set was at the time used and claimed by the defendant as a part of his farm, although unenclosed, they must find for the defendant, unless they also find that the defendant did the act complained of with intent to injure others, and that the burden of proving this intention is upon the plaintiff.

HAYDEN for appellant.

The counsel for plaintiff in the arrangement of the cause in this court will insist upon the following points;

1st. That it was only necessary for the plaintiff to prove in support of his action that the defendant did wilfully set on fire the prairie mentioned in the declaration, at or about the time mentioned in the declaration, whereby the said Robards and Wrights, or some one of them were damaged as alleged in the declaration.

2d. That the court erred in permitting the defendant to give evidence conducing to show that the defendant, Langston, claimed to be the owner of the land outside of his said enclosure or farm, and also in permitting him, Langston, to give evidence that he fed his cattle

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stock corn outside of his said enclosure, near where the fire was set prior to the commencement of this suit.

3d. The court erred in refusing a new trial to plaintiff upon his said motion therefor.

LEONARD for appellee.

1st. The testimony in relation to the extent and boundary of the defendants possession was legal evidence.

Doe vs. Arkwright, 24 Eng. Com. Law Rep. 463-4.

2d. The word "farm," used in the fifth section of the act concerning "woods, marshes and prairies." (Rev. Stat. of 1835, page —) ought not to be confined to that portion of a farmers possessions that is actually enclosed with a fence, that is not the ordinary meaning of the word in the United States, and as used in this statute it ought to receive a liberal interpretation so as to meet the necessities of the country, and where the extent of its meaning is the question in a penal prosecution upon the statute; it ought to receive the largest meaning so as to exempt the party from the infliction of the penalty. Webster's dictionary word 'farm' 1 Blac Com. 61, United States vs. Wiltberger 5 Wheaton's Rep. 95 and 96.

3d. The plaintiff in his declaration having charged the defendant with setting on fire prairie not occupied by him, was not at liberty to abandon in proof his own description of the land to which the fire had been set, and prove the firing of prairie in the defendants occupation any more than he would have been at liberty after alleging the firing to have been of the two mile prairie to have proved it to have been of Thralls prairie in the same county, on this ground the plaintiffs third and sixth instructions were refused, and the defendants second instruction given.

NAPTON, judge, delivered the opinion of the court.

This proceeding was founded on the statute to prevent the firing of woods, marshes and prairies. The statute is very plain, and scarcely admits of misconstruction. It declares that whoever *wilfully* sets on fire a prairie, marsh or woods, and that fire occasions damage to another, shall forfeit a specified penalty. It is also provided that this penalty shall not be exacted where a person is burning up any thing on his own farm and the fire *accidentally* escapes to an adjoining prairie or woods.

(The facts of the present case were these: The defendant put out fire in the prairie outside of his field fence, and the wind being high, it spread rapidly and consumed the fences and grain stacks of two or three of his neighbors. That such a case comes within the statute is clear enough; but proof was allowed to be introduced to show that the land where the fire was set out, *belonged* to the defendant, and that he was in the habit of throwing his stock fodder over the fence upon the ground where the fire was started. This evidence was totally irrele-

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vant. It was immaterial whether the defendant put out the fire upon his own land, or upon land belonging to the United States, or any one else. The question of title has nothing to do with the case. The statute makes no distinction between setting fire on vacant land or land belonging to another than the person doing the act, and putting out fire upon their own land. Nor is the fact that cattle were accustomed to be fed outside of the defendant's enclosure and upon the land where the fire was started, any defence to the action. If it were so, the statute, so far as the protection of prairie farms is concerned would be a *burlum fulmen*. Men are usually very sharp sighted and cautious in matters where their own interest is involved, and there is but little danger from fires put out within enclosures for the purpose of burning up brush stubble or other offensive or superfluous matter. Such fires must first consume the fences of those who start them before they can damage their neighbors. This was permitted by the legislature believing, no doubt, that self interest would induce caution. But knowing that persons who set fire around their own farms to protect them from future conflagration, are not so watchful of the interest of their neighbors as of their own, the legislature declared such act to be done *at the peril* of him who attempts it. If damage results the perpetrator must pay for it, no matter what may have been his motive. Every one who is conversant with the modes of farming in the prairie portion of our State, is aware that the practice of setting out fire near to the farm fence, with a view to protect it, is attended with great danger to the neighboring proprietors, and this practice is obviously the one designed to be furnished by our law. It is equally well known that the practice of feeding stock on the outside of the farm, in the vicinity of the fences, is almost universally prevalent. So that if this circumstance justifies the proprietor, the law is a dead letter.

We do not wish it to be inferred that we would confine the word "*farm*," as used in the statute, exclusively to enclosures. Cases might, no doubt, be put where a farmer would not be responsible for unintentionally firing the woods or prairie, by setting out fire outside of his enclosures. In clearing timbered land, fires are set out to burn up the brush and roots and log heaps before the fence is built, and it would be readily admitted that if this was the sole design of the fire, the farmer would not be answerable, if it accidentally escaped into an adjoining prairie or woods. Other instances might be suggested, but we think there is no difficulty in distinguishing all such cases from the one against which the statute is aimed.

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We shall not advert particularly to the instructions in this case. The second instruction given at the plaintiffs instance is a singular one, coming from the quarter it did. That the court gave it can certainly be no ground of complaint here.

We shall reverse the judgment, because evidence was admitted calculated to mislead the jury.

The other judges concurring, judgment reversed and the case remanded.

BOSTON vs. NEAT.

1. Title to personal property is not necessary to maintain trespass against a stranger to the title. Possession under a claim of title when the trespass is committed, is sufficient.

APPEAL FROM CARROLL CIRCUIT COURT.

ABELL for appellant.

1st. The only right of Neat, if any, to the property injured, being acquired under the stray law, it was necessary for him to show a strict compliance with the provisions of that act, to show a right of property in him, and entitle him to recover for a trespass on his constructive possession to recover in trespass, the plaintiff must have actual or constructive possession. If not having actual possession he must have the property and constructive possession. In this case there was not actual possession, and the evidence was incompetent and insufficient to show property in Neat. 1 Chitty Pl. top p. 193-4-5; 3 Mo. Rep. 214; 8 Mo. Rep. 344

2d. No evidence being given of the value of the property, the plaintiff was only entitled to nominal damages.

3d. In actions of trespass before a J. P. the plaintiff should file a statement of his cause of action and of the amount of his claim, that it may appear that the justice has jurisdiction.

NAPTON, judge, delivered the opinion of the court.

Neat sued Boston before a justice of the peace in trespass and had a verdict for fifty dollars, which the justice set aside. Upon a second trial Neat again obtained a verdict and judgment, from which Boston appealed. Upon the trial in the circuit court the plaintiff Neat gave

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evidence tending to show the following facts: That the plaintiff and defendant lived three or four miles apart, on opposite sides of the Wyaconda creek in Carroll county; that plaintiff had taken up a mare and colt and posted them; that the mare was a work animal and plaintiff worked her for upwards of a year, during which time she had a second colt; that plaintiff used and controlled both the mare and colts as his own horses, sometimes keeping them up in enclosures and sometimes suffering them to run on the prairie with his other stock; that said mare and colts being missing from plaintiff's enclosure on Friday and Saturday, the plaintiff and some of his neighbors (witnesses in the case) went in search of their horses, and found the mare dead near defendant's field apparently with a gun-shot wound in the body, one of the colts in the field dead, also shot, and the other wounded in the leg. The animals seemed to have been shot the same day the witnesses saw them. The defendant was seen at the same time, and his coat was observed on the fence near to the dead colt. Several witnesses had previously heard the report of a gun in the direction of defendant's field.

This was all the evidence in the case, the defendant offering none, but asking the court to declare the law of the case as follows:

1st. If the mare and colt were strays, plaintiff cannot recover damages done said mare and colt unless the evidence shows that the plaintiff complied strictly with the statute in relation to strays, or unless said mare and colt were in the actual possession of the plaintiff at the time of the alleged trespass.

2d. The evidence did not support and was not material to the issue.

These instructions were refused and a verdict and judgment were rendered for the plaintiff. Motions were made for a new trial and in arrest, but were overruled and the case brought here by appeal.

There was no question of title in this case, nor is title necessary to maintain trespass against a stranger to the title. The plaintiff had possession of the animals under a claim of title when the trespass was committed.

Whether the evidence was sufficient to convict the defendant of the inhuman acts charged upon him was for the jury to decide, and his conduct upon the trial in declining to give any explanatory testimony and placing his defence upon a technical ground, seems an acknowledgment that no valid defence existed. What is meant by an actual possession as referred to in the instruction asked, we do not know but we infer from the evidence that it was thought necessary to an actual possession that the animals should have been in the plaintiff's enclosure or stable.

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This is not our understanding of the term. I do not lose the possession of my horse whenever he is turned loose in the prairie. A constructive possession follows the title, but an actual possession is *prima facie* evidence of title. An actual possession is a phrase which must be understood with reference to the subject. If the property be a living animal capable of locomotion and accustomed to run at large, subject only to be caught at the will of the owner, exercising the usual acts of ownership over such an animal must be understood as such a possession as will maintain an action.

The other judges concurring the judgment is affirmed.

LINN COUNTY vs. HOLLAND & BECKETT.

1. The object of the 3d and 4th sections of the act "to enable counties to make contracts &c." (Rev. stat. p. 289) is not to change the rules of pleadings, but to place counties upon a footing with individuals.
2. Where a note is executed to another for the use of a county, suit brought upon it must be instituted in the name of the person who is the *legal* owner.

ERROR TO LINN CIRCUIT COURT.

NAPTON, judge, delivered the opinion of the court.

This was an action of debt instituted by Linn county as plaintiff to recover the amount of two notes executed by the defendants to John D. Grant commissioner of the county seat of said county. The declaration averred that these notes were made to said Grant for the use and benefit of the plaintiff. To this declaration there was a demurrer which the court sustained, and the only question is upon the propriety of this opinion.

The 3d and 4th sections of the act to enable counties to make contracts &c. (Rev. Code p. 289) provide that all notes, bonds &c. whereby a person shall be bound to any county or to the inhabitants thereof, or to the governor or any other person, in whatever form, for the payment

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of money or any debt or duty, or the performance of any matter or thing *for the use of the county* shall be as valid and effectual to vest in such county all the rights, interests and actions which would be vested in any individual in any such contract made directly to him ; and suits may be prosecuted in the name of such county or in the name of the person to whom they are made, as fully and effectually as any person may upon like notes, contracts &c. made to him. The object of this law seems to be to place counties upon a foot with individuals, but not to give them any advantages or to change the rules of pleading. Where the note or contract is made to the county directly, the suit may be brought by the county in its own name, precisely as an individual could. Where the note is made to another for the use of the county, the county must, like an individual placed in like circumstances, bring the suit in the name of the person who is the legal owner of the note.

The other judges concurring, the judgment is affirmed.

LEWIS vs. THE STATE, AT THE RELATION OF MAYO.

1. The provision in the eighth section of the act " regulating clerks," (Rev. Stat. page 201) that "if there be a tie or contested election, it shall be determined by the court to which the office belongs," is constitutional.

ERROR TO PLATTE CIRCUIT COURT.

NAPTON, judge, delivered the opinion of the court.

This was an information in the nature of a *quo warranto* against Daniel P. Lewis, to ascertain his right to exercise the office of clerk of the county court of Platte county. The defendant pleaded that said Lewis, Mayo and one Waggoner, were candidates for the said office, and that said Lewis and Mayo had an equal number of votes, Waggoner having less than either, and that the county court determined the tie in favor of Lewis. A demurrer was filed which the court sustained. The only question designed to be presented by this writ of error, is the

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constitutionality of that provision of our election law which authorizes the county court to determine the election of their clerk in case of a tie.

The provision referred to is found in the eighth section of the act regulating clerks (Rev. Co. 201.) This section provides in relation to the election of these officers, that "if there be a tie or contested election, it shall be determined by the court to which the office belongs." It is suggested that a construction may be given to this provision which will avoid the question of its constitutionality entirely. The authority of determining in case of a tie, may be considered as identical with the power given in the same section of determining a contested election; not as giving to the court a right to determine the tie by giving the casting vote, but simply the right judicially to determine that a tie exists, leaving the consequence of such a result to be settled by other provisions of the law and the constitution.

Such an interpretation of the phraseology used in this section, we apprehend, would only create new difficulties; it is not easy to perceive how the courts could determine a tie in any other mode than by giving the casting vote. The legislature obviously meant that in case of a tie, the court should *put an end* to the contest, and not merely declare that a tie existed and then refer the election back to the people, or leave the governor to appoint, as in case of a vacancy. The legislature might have been more specific in their language, as the framers of our constitution were in making a similar provision relative to the offices of sheriff and coroner, but their intention is sufficiently clear.

The objection to this provision of the election law is based upon its supposed incompatibility with that provision of the constitution contained in the third section of the amendments adopted in 1834, which provides that the clerks shall be elected by the qualified voters of their respective counties, and shall hold their offices for the term of six years and until their successors are duly elected. It is thought that the power which the legislature have given to the courts of deciding an election in case of a tie by giving the casting vote, is utterly at variance with the constitution which says that the clerks shall be elected by the people. This idea seems to result from a refinement in reasoning which loses sight of the spirit of the constitution and sticks very closely to the letter. Previous to the passage of these amendments, clerks of courts were appointed by the courts. The amendments declared that thereafter they should be elected by the people. The difference between an election and an appointment is well understood. The word

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election was used in the sense in which it had been used in various other provisions of our constitution and in which it was well understood by our people. It was not meant that an actual majority of the people or qualified voters of a country should be necessary to the election of a clerk, for we know that a very small minority may elect. It was not meant that a majority of those persons who actually voted should be necessary, for we know that according to our practice a bare plurality elects to all offices in this State. And yet it might be said, with some plausibility, that an election by a bare plurality of voters is not an election by the qualified voters of the county. In some of our sister States we know that a majority of the whole votes cast is considered necessary to an election. Yet the practice has never obtained in this State, and therefore we conclude, when the constitution or any legislative enactment provides for an election of our officers, without specifically stating on what principles that election is to be conducted, that a plurality of votes elects, and that a majority of all the votes cast is not necessary to an election. Now, I can see nothing more inconsistent with the elective principle in allowing a selected tribunal in case of a tie vote, to give a casting vote, and thereby determine the election, than there is in allowing a small fraction of the people to elect when there happens to be several candidates, and the successful one has but a small minority of the whole votes cast. The power of giving a casting vote, in case of a tie, is entirely dissimilar to a power of appointing. In the latter case the appointing power is unlimited and unrestricted in its range of selection, except so far as the constitution or laws may have prescribed qualifications for the officer; in the former, the tribunal selected for the purpose merely decides between the individuals already designated by the popular voice as the choice. A and B have each an equal number of votes, and the court must vote for either A or B. It cannot select C, who was not a candidate, or, if a candidate, received a less number of votes than either A or B. If the court could, under such circumstances, select C, then this power would be a power of appointment, and inconsistent with the idea of an election. But the power of giving a casting vote is not a power of appointment, nor has it any of the ingredients of such a power. It is not, therefore, inconsistent with the elective principle, but, on the contrary, is a means judiciously provided by the legislature to carry out the intent of the constitution.

But aside from all argument on this subject, we think the framers of our constitution have themselves given us their opinion on this very

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question. The constitution provides that sheriffs and coroners shall be elected by the qualified voters of their counties, and shall hold their offices for two years, and until a successor is appointed and qualified. In a subsequent clause to this provision, it is further provided that where two or more persons have an equal number of votes for said offices, and a higher number than any other person, the circuit courts of the counties shall "give the casting vote, and all contested elections for said offices shall be decided by the circuit courts respectively." This provision, although its phraseology is more explicit, is substantially the same, so far as sheriffs and coroners are concerned, with the legislative provision concerning clerks. Now it is strange that the constitution should first declare that sheriffs should be elected by the qualified voters, and then, in the next breath, should provide for the courts to give a casting vote in case of a tie, if this last power was incompatible with the elective principle. It is evident that the framers of the constitution did not so regard this provision. They saw nothing inconsistent or contradictory in the two provisions. They believed themselves to be carrying out the elective principle in providing for the determination of an election where the people or voters were equally divided. Such a contest must be determined in some way, and to send the election back might be, in effect, retaining the old incumbent. The same result might again happen, and so on *ad infinitum*, and so the old incumbent would hold on for life. A result greatly more at variance with the spirit of the constitutional provision than a determination of the contest by the casting vote of a court.

The constitution declares that the clerks of courts shall be elected by the qualified voters of the counties. It makes no provision for the case of a tie. Indeed, no details are given in relation to the mode or form of the election. These are left to the legislature. The legislature could not make provisions which would defeat the main purpose of the constitution, but they may make laws which will carry the general principle into effect. That the law now in question does not conflict with the general elective principle adopted by the constitution, is proved by the example of the constitution itself, which in some instances has resorted to this very mode of determining an election in case of a tie, which is now so much objected to when enacted by the legislature. The practice in other States is also in conformity to the views entertained by our legislature, and such a practice would be entitled to weight in determining the constitutionality of such a law, if the question were even doubtful upon principle. But we entertain no

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doubt of the propriety of such an enactment; and that it no wise conflicts with the constitution.

The other judges concurring, the judgment will be reversed and the cause remanded.

COLE COUNTY AND E. BARCROFT vs. ANGNEY, PRICE AND DAVISON.

1. Where a demurrer to a bill in chancery is overruled the court cannot enter up a decree in conformity with the facts stated in the bill, but should compel the defendant to answer.
2. A purchased a tract of land from C—executed his note for the purchase money with B as surety. By the terms of sale C retained a lien to secure the purchase money: A afterwards became insolvent and the land was sold under execution and purchased by D: C obtained judgment upon the note against A and B and levied his execution upon the land: D filed his bill and prayed that C be restrained from selling the land until the property of B, the surety, be exhausted. Held,

1st. That C had a right to make his debt off the land in the first instance.

2d. That if the debt be made off the surety a court of equity would substitute him in the place of the creditor and give him every preference and lien which the creditor had.

Question,

Has a court of chancery jurisdiction to arrest, by injunction, the sale of land levied on under an execution issued from a court of law, upon the sole ground, that the land does not belong to the defendant in the execution or has passed from him.

APPEAL FROM COLE CIRCUIT COURT.

KOWNSLAR for appellants.

The circuit court ought to have sustained the defendants' demurrer, because no exhibits were filed by the complainants with their bill, and for the additional reason that the bill is multifarious, the interests of Angeny, Price and Davison being entirely distinct and separate and wholly disconnected.

The county of Cole had a prior lien on the property of Wells by virtue of the 15th section of the sixth article of an act to provide for the organization &c. of common schools, approved 9th February 1839. Sess. acts p. 147.

That section is as follows, to-wit:

In case any officer or other person indebted or accountable for any money or property due or belonging to the State or any township or district on account of any school fund, or income

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thereof, shall die, become insolvent or bankrupt, or shall make a general assignment of his property or effects the debt or amount so due or to be accounted for shall have priority over other debts and shall be first paid.

Under this law the court ought to have sustained the demurrer, for the bill does not show that Cordell had any lien on the land of Wells at the time this legislative lien was created, nor does it show that Wells had any property—it only shows that Barcroft, the security of Wells, had property.

The bill is manifestly informal and insufficient in not setting out the dates of the judgments, executions and deeds referred to in said bill—and in not making exhibits of them.

The circuit court had no right by the decree, as it did, to compel the county of Cole to resort to one of several funds for the payment of its debt. The county had the undoubted right to resort to one or more, at its own pleasure.

E. L. EDWARDS for appellees insists,

1st. That the 15th section of the last article of the school law is unconstitutional, being in derogation of the rights of the citizens of this state. The right to priority is an incident of sovereignty, and cannot be granted to one class of citizens to the injury of another.

2d. That although said law may be constitutional and valid, still it devolves on the county to show that Wells was insolvent at the time of rendering the judgment in favor of said county against Wells & Barcroft, and she cannot claim the benefit of said law, until a case is made out by her showing that she is entitled to the benefit of its provisions.

3d. That there is a difference between a priority and a lien. A lien attaches and holds from the time of its due execution &c. Priority does not attach until the happening of some one of the contingencies mentioned in the law giving such priority.

4th. That the insolvency of a debtor contemplated by the act, means a *legal* insolvency, and not a mere inability to pay his debts, and this insolvency must be established before priority attaches.

To sustain this view of the case, the appellees rely upon the following authorities. 1 Kent's Com. vol. 1 p. 143; 2d Cranch 358; 3 Ib. 73. In 2d Wheaton 399 this question is fully discussed. See also Brent vs. Bank of Washington, 10 Peters 596.

NAPTON, judge, delivered the opinion of the court.

This was a bill in chancery filed by Angney, Price and Davison to enjoin further proceedings upon an execution issued in favor of Cole county against Wells and Barcroft and levied on certain lands claimed by the complainants.

The bill stated, that on the 29th June 1842, they became the purchasers of certain lots and land, lying in the City of Jefferson and county of Cole, at public sale made by the sheriff under sundry executions issued against John W. Wells and levied on said land and lots and that they received deeds from the sheriff duly executed and acknowledged. The bill further states, that in 1838, John W. Wells became the purchaser of a portion of the 16th sec. in township 45 and R. 13, and gave his bond to the county of Cole with Elias Barcroft as security for the

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payment of the purchase money ; that the county of Cole obtained a judgment against said Wells and Barcroft in 1842, (at the June term) and that an execution was issued and levied upon the land above stated to have been purchased by the complainants ; that Barcroft has sufficient unincumbered property to satisfy the said execution, but that Cole county claims a priority of lien on Wells' land by virtue of the 15th section of the 6th article of the act regulating common schools, approved February 9th 1839. An injunction is therefore prayed to stay proceedings, until all the other property of Wells and Barcroft is exhausted.

A variety of proceedings took place subsequent to the filing of this bill, but they were all finally withdrawn and a demurrer filed. The court overruled the demurrer and thereupon enjoined the county of Cole from proceeding further upon her execution against the land specified in the bill, until she had exhausted the estate of Barcroft, the security of Wells.

The question proposed to be settled by this appeal, is understood to be, the right of the county of Cole, under the 15th section of the 6th article of the act concerning common schools, to a priority in the lands sold to the complainants ; but the facts necessary to an understanding of the subject are not presented by the record. The bill after setting forth the title of the complainants, alleges, that the county had caused the land to be levied on, and was about to have it sold, under a pretence or claim that a lien was given to her under the law above referred to ; but the facts, which would be essential to show the rights of the county are not stated. It does not appear, except inferentially, that Wells, the principal in the land, was insolvent or had made a general assignment of his property, and it does not appear, if this was the case, at what time the insolvency occurred, or the assignment was made. The priority given to the county by the school law, in the section referred to, is not unlike that preference or lien which the United States have retained over the property of accounting and disbursing officers and others by the 5th section of the act of 1789. The right of preference of the United States, was given by that law, where there was a legal insolvency, or a voluntary assignment of all the property for the benefit of creditors, or death ; but if, under that law, before the assignment, insolvency or death, the debtor made a *bona fide* conveyance of his estate to a third person or mortgaged it to secure a debt or his property was seized by a *fi. sa.*, and divested out of the debtor, it was always held, that such property could not be made liable to the claim of the United

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States. A judgment was a mere lien, and as such, was defeated by the prior lien of the United States, but a sale under execution or other act having the effect of transferring the property, passed the title. *Thelusson vs. Smith & Whea. R.*

The same priority is given by the act concerning common schools, to the state or county, in case an officer having school funds in his hands or a debtor who has borrowed it, becomes insolvent or bankrupt, or makes a general assignment of his property. Whether the facts in the present case would warrant the county in proceeding against the land sold to the complainants, does not appear.

The circuit court entered up a decree upon overruling the demurrer. Such a cause is unauthorized by the practice in chancery. It might be done by consent, the parties agreeing to abide by the facts as presented in the bill; but in this case no such consent appears, and if it had, there is the further difficulty that the complainants made out no case for an injunction. A demurrer in chancery is unlike one at law: "It is an allegation of the defendant, which admitting the matters of fact alleged by the bill to be true, shows, that as they are therein set forth, they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer; or that for some reason apparent on the face of the bill, or because of the omission of some matter, which ought to be contained therein, or for want of some circumstance, which ought to be attendant thereon, the defendant ought not to be compelled to answer. It therefore demands the judgment of the court, whether the defendant shall be compelled to answer the complainant's bill or to some certain part thereof." Story's Pl. S. 446. Admitting the demurrer to have been properly overruled, the only effect of such a step was to compel the defendant to answer. To bring up the question of the construction of the law concerning common schools, the defendant might have set forth the facts in a plea, not disclosed in the bill, by which he could have alleged matter, which had it appeared upon the face of the bill would have been a good cause for demurrer.

If it was the design of the bill to rely upon the right to an injunction, upon the sole ground that Barcroft the security, had property, and that the county must, whether the priority alluded to existed or not, first exhaust Barcroft's property, before she could resort to the land of Wells, sold under prior executions, the bill was properly demurred to. A court of equity would not interfere in such a case. The county who is creditor may exercise her choice in pursuing either the principal or security, but if the debt is made out of the security, he has

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an unquestioned right to be substituted in the place of the creditor and to avail himself of every preference and lien which the law has given the creditor. So that it is apparent that the interference of the court would only tend to a multiplicity of suits. The county in this case has selected to resort to every right which the law gives her to secure the debt out of the property of the principal debtor, and a court of equity would hardly interfere to prevent her from taking this course, when, if the security is compelled to pay the debt, he can immediately turn round, place himself in the shoes of the creditor, and avail himself of every lien and preference which the law has given the creditor.

It may be a question proper to be examined, whether, if the facts were altogether as the complainants suppose them to be, and the construction of the act should be in conformity to their views, the case would be a suitable one for interference by injunction. To arrest the sale of land levied on under an execution issued from a court of law, upon the sole ground, that the land does not belong to the defendant in the execution or has passed from him, before the levy, is certainly a novel exercise of chancery jurisdiction. We will not say, that circumstances may not render such a step proper, but it would seem that the only effect of such a proceeding must be to anticipate a question of title, most properly and peculiarly appropriate to a court of law.

If the facts be as the case supposed, the purchaser can acquire no title nor can the sale affect or disturb the rights of those who have the title. The purchaser must resort to his ejection, before he can get possession and why interfere by way of injunction? A person desiring to purchase at such a sale might desire the question of title to be settled, before venturing on the purchase, but the real owner, whoever he may be, can have but little interest in the matter. A sale cannot injure him or impair his title. If it were personal property, the case would be altered, to some extent—although I have never known or read of a case of injunction to restrain the sale of personal chattels, merely upon the ground that they do not belong to the defendant in the execution. A more convenient mode of settling the question of title, in regard to personal property, is provided for by statute.

Judge McBride concurring the decree will be reversed and the cause remanded.

SCOTT, judge, not sitting.

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1. An acceptance of a deed of inferior value to such an one as the grantee is by his contract entitled to, as a compliance with such contract, is a waiver of such better title.
2. What acts do constitute a waiver of a condition in a bond, is a question of law to be determined by the court. Whether any of the acts which constitute a waiver do exist in the particular case upon trial is a question of fact to be decided by the jury.
3. An acceptance of a deed for land while there are liens upon it, by defendant holding plaintiff's obligation for a "clear title in fee simple," is not a waiver of the obligation, unless he had knowledge of the liens when he took the deed; or unless he failed to make his objection, within a reasonable time after discovering the defect.
4. A person may by his acts, words, or mere silence, waive his rights secured by bond; but the acts from which such waiver is inferred should be unequivocal.

ERROR TO COLE CIRCUIT COURT.

HAYDEN for plaintiff.

That the court erred in sustaining the demurrer to the first and fourth counts of the plaintiff's declaration at the November term, 1847, of the court. The defendants having pleaded to the merits of those two counts, and issue having been taken upon the pleas of defendant thereto. The pleas not having been withdrawn by defendant, nor issues thereon disposed of.

2d. The court erred in refusing to instruct the court sitting as a jury to try the cause in manner and form as prayed for in the motion of the plaintiff.

3d. The court erred in pronouncing and declaring the law to be as the same was declared and pronounced by the court.

STRINGFELLOW for defendants.

The only issue submitted to the court sitting as a jury was the acceptance of the deed made by Paulsel and others to Edwards by Edwards in discharge of the condition of the bond sued on. The instruction given by the court properly presented this issue. The court might and ought to have declared the evidence insufficient to show such an acceptance.

The judgment liens given in evidence by the defendants were competent and relevant, without such evidence; indeed, the plaintiff had shown a strict compliance with the condition of the bond. It was for the defendant to show the incumbrances and thus present the question as to the acceptance of the deed. By the condition of the bond and under the issues in this case, it devolved upon the plaintiff to show a discharge from the performance of the condition. If there had been no incumbrances upon the land, it would only have been necessary to show title in the obligees and the delivery of a deed conveying the title to Edwards. But incumbrances being shown, it became necessary to show more, to show that the deed was made by one party and taken by the other as a specific performance of, or a satisfaction of the condition.

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NAPTON, judge, delivered the opinion of the court.

This was an action of debt instituted upon a bond for the payment of thirteen hundred and ninety dollars. The consideration of the bond was the sale of certain lots in Jefferson City by the payees to the defendant, Edwards, and it was made payable upon the execution of a deed conveying a clear title in fee simple to these lots. The plaintiff was the assignee of the bond.

The pleadings in the case are fully stated in the former opinion delivered by this court. 10 Mo. Rep. 671. After the case was remanded to the circuit court, a trial was had upon the issues made up in the second and third counts of the declaration. The first and fourth counts were considered by the circuit court as out of the case, in consequence of the opinion expressed by this court of their insufficiency. The defendants withdrew the pleas previously filed and put in the general statutory plea.

Upon the trial the plaintiff read the bond and assignment and a deed to Edwards for the lots, and proved by Enos B. Cordell that as an agent of the payees or their attorney, he delivered to Edwards the deed given in evidence, which Edwards received without objection, and without any conversation passing between them on the subject of the deed; that the witness said to Edwards "here is a deed for you," to which Edwards made no reply. It also appeared from the endorsement on the deed that it was filed in the recorder's office shortly after its delivery. The defendants then proved that there were considerable incumbrances in the shape of judgment liens upon the property, at the time of the acceptance of this deed. This evidence was objected to, but admitted. No other evidence was given on either side, whereupon the court declared the law to be as follows:

"The law of this case is, that if the defendant, Edwards, accepted the deed read in evidence before the commencement of this suit, in discharge of or as a compliance with the proviso in the instrument sued on, the plaintiff is entitled to recover, if the note sued on was assigned to the plaintiff as alleged. But if the said Edwards, although he may have taken such deed into his possession, when handed to him by the witness, Cordell, did not accept the same in discharge of or as a compliance with the said proviso, the defendant is entitled to a verdict, if the fact be, that at the time of the delivery of the deed there were

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judgment liens on the land, which continued in force up to the trial or commencement of this suit.

A good many instructions were asked by the plaintiff, some of which were given and some refused ; but as the opinion given by the court covered the whole case, or at least contained the views entertained by the court of the proper question to be submitted to the jury, it is unnecessary to copy these instructions at large.

The plaintiff took a non-suit, and afterwards moved to set it aside, which being refused, he appealed to this court.

The instruction given by the court leaves the jury to determine upon the facts in evidence, whether there was a waiver on the part of Edwards or not. There is, perhaps, some obscurity in its phraseology, but I understand the court to declare that the defendants were entitled to a verdict if the jury believed that Edwards did not accept the deed from the Paulsels as a compliance with their contract, provided that it also appeared to their satisfaction that there were incumbrances on the land. The proposition of the court, transposing the language a little, may be stated thus. If there were incumbrances upon the land conveyed to Edwards, the deed of the Paulsels (the payees in the bond) did not convey such a title as their bond called for ; but if the jury believe that Edwards accepted this deed as a compliance with his contract, the plaintiff must recover.

It is obvious that the instruction of the court assumes that whether Edwards accepted the deed as a compliance with his contract, or not, was a *question of fact*, to be determined by the jury.

What acts or what declarations amount to a waiver, is, in my opinion, a question of law, whether such acts or declarations were made or performed, is for the jury. Hagart vs. Nevins, 6 S & R 360 ; Ins. Co. vs. Kyle, 11 Mo. R. Rhett vs. Poe 2 How. 481 ; Bank of Utica vs. Bender, 21 Wend 643. I use the term waiver as a more convenient one than the term acceptance, as used in the plea, for they are the counterpart of each other. An acceptance of a deed of inferior value to such an one as the grantee is by his contract entitled to; as a compliance with such a contract, is equivalent to a waiver of such better title. Waiver is then, like the question of demand and notice in suits upon bills of exchange, or due diligence or sea worthiness of a ship, or what constitutes a deed ; a question of law to be determined by the court. Whether it exists or not in the particular case upon trial, is for the jury to decide upon instructions from the court. I know that a great many of these terms are, in certain conditions of the evidence, so clear, that

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courts do not usually find it necessary to give any explanation of their legal meaning. Where the dispute is really about a question of fact, and the meaning of the terms used in the instructions is well understood, it would be a work of supererogation for the court to enter into minute explanations upon points not disputed. Such is not the case here. There is no dispute about the facts at all, but the sole question in the case is, what is the inference or presumption which the law raises upon those facts.

A waiver may be of two kinds, an express and an implied waiver. The former would need no explanation, and of course where the evidence showed or had a tendency to show a direct and express waiver, the question would be for the jury entirely. No explanation from the court of the legal meaning of the term would be necessary. But it was not attempted, nor was there any evidence in this case, to prove an express waiver. There was no evidence in the case to show that the defendant Edwards said any thing about a waiver, but certain acts are proved from which a waiver *may* be inferred, and it was left to the jury to say whether those acts *implied* a waiver or not. To submit such a question to a jury would, in my humble opinion, be subversive of one of the great leading objects of every system of law, uniformity and consistency in all legal conclusions upon the same state of facts. If the implication which may arise from the facts stated on this record, is a matter of fact to be decided according to the notions of a jury, it must happen that a great diversity of opinion will prevail as to the character of rights and the merits of titles, depending upon the same state of facts. This is contrary to the theory of our system of laws. A person's title to land, or legal rights of any character, depending upon a certain state of facts, can neither be better or worse than the title or right of another which depends precisely upon the same state of facts. The law pronounces the conclusion upon a given state of facts, and it is not left to the caprice of juries to decide one man's title good to-day and another man's bad to-morrow, both depending upon the same facts.

If there be a question of *intention* in the case, whether it be upon a matter of waiver, or other analogous subject, it is undoubtedly the province of the jury to pass upon this as one of fact. Where the jury have found what acts have been done and with what intentions they were done, it then belongs to the court, as the organ of law, to pronounce the conclusion which the law draws from the facts found. This

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is always the case in special verdicts, and may be done hypothetically in other cases.

The facts of the present case were that a deed was handed to Edwards, and received by him, and placed upon the record. This deed, for aught that appears, was unobjectionable on its face ; but it appeared that when it was delivered large incumbrances overhung the title. It does not appear whether Edwards knew of these incumbrances or not. Now it is evident that the question of waiver here turns entirely upon the existence of a fact about which there is no proof whatever. If Edwards, when he received this deed, which was good enough on its face, was entirely ignorant of the existence of the judgments which were liens upon the land conveyed, his acts cannot be construed as a waiver. Edwards could not intend to waive a defect of which he had no knowledge. His conduct in receiving the deed may be just as well reconciled with the hypothesis that he supposed himself to be getting the very title which his contract called for, as with the supposition that he knew of the incumbrances and was willing to risk the covenants of his deed.

The doctrine of waiver is not entitled, upon principles of sound policy, to receive a latitudinous construction. It is, at best, allowing a person to be deprived of rights for which he has the most solemn guarantees by acts or words or mere silence. This may be done, as has been already decided, but the acts to constitute this waiver should be *unequivocal*. The plaintiff who asserts the waiver must prove it. The defendant stands upon his written contract ; if a waiver of its obligations is asserted, the plaintiff must make out a clear case. How then stand the facts here ? The plaintiff proves the acceptance of a deed, without objection. *Prima facie* this deed, (for it was good on its face and contained the usual covenants) conveyed the very title which the contract called for. But the defendant shows that this deed did not convey an unencumbered title ; that there were unsatisfied judgments on the land. Where then is the proof of waiver ? which the plaintiff must make either by showing an express waiver by language or writing, or such acts as amount to a waiver. No express waiver is attempted to be shown, and the acts which have been proved fall short of raising any such presumption, by a failure to show that Edwards knew of the judgments ; that he was aware of the defect of title. It cannot be denied that this fact would settle the question at once, that if Edwards was acquainted with the existence of the judgment liens, his conduct would be *prima facie* a waiver, or an acceptance of the infe-

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rior title, and that if he did not know of such liens his conduct does not amount to a waiver, but can be entirely reconciled with the supposition that he believed himself to be accepting a good title—just such a title as his contract secured him.

There is no doubt that the knowledge or ignorance of Edwards in relation to these liens is a fact which may be established by circumstantial evidence; and that this evidence is for the jury to consider. It may be conceded also that it is rather hard to impose upon the plaintiff the burthen of proving the defendant's knowledge of the liens; but it must be observed, that it would be equally troublesome for the defendant to prove his want of information. And if there be any difficulty in establishing the existence or non-existence of this material fact, that difficulty ought not, upon principles of equity, to impose any additional burthens upon the defendant, who is clearly entitled, under his contract to require a good title, and ought not to be deprived of this solemn security without the most unequivocal evidence.

It cannot be contended that the record of the judgment liens, is any evidence of actual knowledge of those liens on the part of Edwards. Such record under our statute is a constructive notice, but has no reference to such a question as arises here between the parties to the conveyance. Such constructive notice only affects subsequent purchasers or creditors. If, however, it be thought that there is any evidence from which a jury might infer a knowledge of these liens, then let that question be put to the jury. If the jury believe from the evidence that Edwards received the deed tendered to him by Paulsel's agent, without objection, and placed it upon record with a knowledge at the time that such deed did not convey an unincumbered title, or if Edwards subsequently ascertained the existence of the incumbrances, and did not, within a reasonable time, make any objections to this defective title, such acts are an acceptance of such defective title in lieu of the one his contract secured to him.

Judge McBride concurring, the judgment is reversed and the cause remanded.

Scott, judge, not sitting.

CROWLEY vs. WALLACE.

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1. The failure of a constable to specify in his return, that the writ was served in the township, will not vitiate all the subsequent proceedings had upon it, so that they may be pronounced void in a collateral suit.
2. If the *transcript* filed in the clerk's office shows that an execution had been issued by the justice and returned "no property found :" it is not necessary in a collateral suit to produce the *original* execution to show that an execution was properly issued by the clerk.
3. The legal effect of the delivery of a sheriff's deed, is to vest the title in the purchaser, *by relation*, from the day of sale : and is admissible in evidence to establish an allegation of title at that date.
4. The certificate required to be endorsed by the clerk upon a sheriff's deed, need only be a certificate that the deed was acknowledged ; if however he adds a copy of the entry required to be made by him on his record, it is superfluous and will not vitiate the acknowledgment.

ERROR TO HENRY CIRCUIT COURT.

STRINGFELLOW for plaintiff in error.

1st. The summons issued by the justice of the peace was not so served as to authorize a judgment by default against Wm. Crowley Sr. It does not appear that the writ was served in the township.

2d. The first execution issued by the justice does not appear to have ever been returned, and thus the second was improperly issued.

3d. The return of the constable on the execution issued 7th July 1845 is insufficient to authorize the clerk to issue on the transcript. At that time the constable had jurisdiction to levy and sell under executions throughout the county and it should appear that there was no property of defendant subject to the constable's execution.

4th. The copy of that execution, with a copy of the return were improperly admitted as evidence. The originals should have been produced.

5th. The deed of the sheriff should have been excluded. The suit was instituted 9th March 1846 and the deed executed 20th April following. 1 Richardsons Equi. Rep. 340; Buxton vs. Carter 11 Mo. Rep.

6th. The sheriff's deed was not acknowledged in court. The deed offered in evidence purported to convey certain lots of land, while the acknowledgment offered in evidence was of a deed conveying other and different lands, both the deed and acknowledgment should have been excluded. 10 Pick 309; 5 Blackford 106.

7th. The evidence offered by plaintiff to show that the deed from William Crowley Sr. to Daniel Crowley was illegal and insufficient. It consisted entirely of the declarations of William made after the sale to Daniel.

8th. The instructions given for the plaintiff should have been refused.

1st. They submitted to the jury matters of law which were exclusively for the consideration of the court.

2d. They were erroneous in declaring that the deed was void if Wm. Crowley the vendor intended to defraud his creditors. The deed was valid unless Daniel Crowley were a party to the fraud.

9th. The instructions asked by defendants were manifestly legal, and supported by the evidence.

10th. The verdict should have been set aside.

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1st. The sheriff's deed under which plaintiffs claimed, was not made until some forty days after the institution of the suit, so that they had no title at that time.

2d. The sheriff's deed was never acknowledged; until properly acknowledged it conveyed no title.

3d. No proof was given that defendants had ever been in possession of any of the land sued for except forty acres being the se. qr. of sw. qr. sec. 1 T. 40 R. 27, nor was any evidence given that defendant held this tract claiming title to the others so as to give implied possession. On the contrary the deed to Daniel Crowley, under which defendants claimed if at all showed a claim to other and different lands from those sold by sheriff and sued for.

4th. The forty acres of which defendants were in possession were conveyed by the deed of Wm. to Daniel Crowley long prior to the suit by Wallace and Wallace against Wm. Crowley, and the evidence given to show such deed fraudulent was altogether illegal and insufficient.

STUART & MILLER for defendants,

In this case the plaintiffs or appellees will insist that the court committed no error in permitting the plaintiff to read the summons issued by the justice against Wm. Crowley that although not strictly legal proof, that it was not necessary that the plaintiff should go back and show any proceedings before the justice prior to the filing the transcript, and that such proof being unnecessary could not prejudice the defendants, that it was insufficient for the plaintiff's to have produced the transcript of a judgment under which he claimed. That the transcript of the judgment filed in the circuit court with the execution and levy and certificate of sale by the sheriff was competent legal proof for the plaintiffs. See case of Jones vs. Luck, Mo. Rep.

The appellees will also insist that the sheriff's deed offered in evidence was properly admitted as evidence in this suit although it bore date subsequent to the institution of the suit, the levy and sale under which that deed was executed was made prior to the institution of the suit, the suit being commenced in March 1846, and the levy and sale made in the months of September and October 1845, that is, the levy in September and the sale in October, and that the deed subsequently made in April 1846 related back to the day of sale. The defendants set up in their defence a deed from Wm. Crowley to Daniel Crowley in 1844. But the plaintiffs introduced proof that that deed was fraudulent, and the question being submitted to the jury they so found it to be by their verdict, consequently the defendants showed no superior outstanding title, in fact Wm. Crowley the defendant in the execution under which the Wallace's claim could not set up an outstanding title, and the title set up by Daniel Crowley was proved to have been fraudulent and so held by the jury, so that in this case there was no intervening or prior purchase to prevent the sheriff's deed from relating back to the day of sale by the sheriff, as to the doctrine that the sheriff's deed will relate back to sale and vests the title in the purchaser from the day of sale. See the following authorities: 20 Johnson 537; 15 Johns 309; 3 Cowen 75; 2 Wendell 507; 9 Mo. Rep. 528.

The plaintiffs or appellees will therefore insist that upon these points the circuit court committed no error. The instructions asked by the defendants were properly refused, and if not, yet they were not prejudiced as the law was correctly given by the court and covered the grounds upon which the defendants' instructions were based. It will be recollected by the court that Daniel Crowley was not a party in possession but came in upon his motion to be made a defendant, and set up a deed from William Crowley to himself prior to the sheriff's sale, but which deed was held to be fraudulent and so decided by the jury. The evidence of the fraud was read to the jury in depositions and other proof and no exceptions or objections made upon the trial to the competency, or relevancy of the proof.

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NAPTON, judge, delivered the opinion of the court.

This was an action of ejectment to recover a tract of land, described in the declaration as the se. qr. and e. hf. of ne. qr. of sec. 2, the se. qr. of sw. qr. of sec. 1 and the e. hf. of ne. qr. of sec. 5, all in town. T. 40 R. 27. The plaintiffs had a verdict and judgment. The title was as follows: 1st. An original summons issued by a justice of the peace, requiring William Crowley to appear before him on the 22d July 1844, in the matter of B. F. & T. B. W. vs. Crowley, on which was returned: "Summons served by reading the same to W. Crowley on the 13th July 1844: M. Gragg constable." 2d. A transcript of a judgment, filed in the office of the clerk of the circuit court, of B. F. & T. B. Wallace vs. Crowley. This transcript showed a judgment by default on 22d July 1844—execution August 5, 1844—renewed 15th October and returned 17th December 1844, no property found—and the transcript filed in clerk's office of circuit court February 3d 1845. 3d. An execution from the justice dated 7th July 1845 and returned *nulla bona*. 4th. An execution from the circuit court dated 22d Sept. 1845, the return of which shows a levy, on the 22d September 1845, upon the land described in the declaration—a sale on the 15th October 1845, to plaintiffs. 5th. A deed from the sheriff, for the same land, dated 20th April 1846. This deed was acknowledged at the April term 1846. The record of which describes the land as the deed does, excepting that the se. qr. of the sw. qr. is placed in section 5 instead of section 1, the words "of S. 1," being omitted. It describes the land further as the same levied and sold under execution in the case of Wallace vs. Crowley &c. The deed was filed 11th June 1846.

All these documents were objected to and exceptions taken to their admission.

Oral testimony was given to show, that W. Crowley Sr. (one of the defendants) was in possession of the premises sued for. But the witness in describing the land, only spoke of the se. qr. of sw. of sec. 1 T. 40 R. 27, as part of the land in possession of the defendant.

Daniel Crowley, who was not an original defendant, had been admitted as such, at his instance.

The defendants read a deed from W. Crowley Sr. to Daniel Crowley, dated 8th March 1844, conveying the se. qr. and e. hf. of the ne. qr. of sec. 2 T. 40 R. 27, and the sw. qr. of sec. 1 T. 40 R. 27 and n. hf. of nw. qr. of sec. 1 T. 40 R. 27, recorded same day.

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The plaintiffs then introduced evidence to prove that this deed was fraudulent.

At the instance of the plaintiffs the court gave the following instructions.

1st. If the jury believe from the evidence, that the plaintiffs have shown a valid judgment and execution in their favor against William Crowley, and a sheriff's deed, by virtue of said judgment and execution to the land in controversy, and that said defendants were in possession of the land at the commencement of this suit, and that the deed from W. to D. Crowley was made for the purpose of hindering, delaying or defrauding creditors, they must find for the plaintiffs.

2d. If the deed from W. to D. Crowley was made for the purpose of preventing the creditors of said William from levying upon and selling the said land, the deed is void, provided the said William had not sufficient other property upon which to levy.

The other instructions given on the same side are mere repetitions of these.

Instructions were also given on the part of the defendants, in most particulars, the same already stated with this additional one, that the plaintiffs could only recover so much land as the defendants were proved to be in possession of.

The verdict was that the defendants detained the lands specified in the declaration, the usual motion to set aside the verdict was made, and a bill of exceptions filed.

There seem to be no questions presented by this record, except such as relate to the various documents offered in evidence to make out the plaintiffs title. The question of fraud was submitted to the jury upon evidence and instructions, neither of which were objected to at the trial.

The title of the plaintiffs was derived from a purchase at a sheriff's sale. This sale was made under an execution issued upon a transcript of a judgment obtained before a justice of the peace. Both the transcript and the execution were in evidence, and the plaintiff, in order to show authority on the part of the clerk to issue the execution, gave in evidence a copy of an execution issued by the justice with the return of *nulla bona* thereon, certified by the justice who issued it. The plaintiffs, for the purpose, it is presumed, of showing jurisdiction in the justice over the person of the defendant, W. Crowley, also produced the original summons with the return of the constable thereon. The admissibility of this summons, with the return, presents the first question we will consider.

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The objection taken to the summons is, that it does not appear from the return, that the writ was served in the township. The question is not whether the return would be quashed for insufficiency, but whether the failure of the officer to specify in his return, that the writ was served in the township, shall vitiate all the proceedings so that they may be pronounced void in a collateral suit.

The form of the return is not prescribed by statute, yet the return should regularly show that the writ was executed within the officer's jurisdiction. Had the return showed that the writ was served in a place without the jurisdiction of the officer, the proceedings based upon it would be void. But inasmuch as the return is silent on the subject, the presumption must be, when attacked in this collateral way, that the writ was served in the township. Wilson vs. Jackson adm. 10 Mo. R. 329; Saunders vs. Rains, Ib. 770; Perryman vs. Relfe, 8 Ib. 208.

The plaintiffs further attempted to show that previous to the issuing of the execution from the circuit court, an execution had been issued by the justice, directed to the constable of the township in which the defendant resided, and was returned. "That the defendant had no goods or chattles whereof to levy the same." This was done by the transcript, from which it appeared that an execution issued August 5, 1844, that it was renewed 18th October, 1844, and returned 17th Dec., 1844. "No property found." The plaintiff, however, gave in evidence a certificate copy of an execution issued by the justice on the 7th July, 1845, and returned "no property found." The objection to this is, that the original was not produced. The evidence was superfluous, because the transcript showed that one execution had already issued and returned *nulla bona*, which was sufficient to authorize the execution from the clerk's office of the circuit court.

The objections to the sheriff's deed are two-fold. First, that it was executed on the 20th April, 1846, and the declaration was filed on the 9th March, previous, in which it is averred that the plaintiff's title accrued on the 20th October, 1845; and secondly, that the acknowledgement is insufficient.

The case of Buxton vs. Carter, (11 Mo. R.) is cited in support of the first branch of this objection, and the case would certainly be decisive against the plaintiff were it not for the intervention of another principle. I allude to the doctrine of relation: which is, that where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred, and to this the other acts shall

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have relation. This principle has been often recognized, and is considered as peculiarly applicable to a case of this kind, where no strangers or third persons, can be effected. It is a fiction of law, and cannot be applied to a better purpose than where it used to prevent another fiction, the date of the demise in the declaration in ejectment from operating an inconvenience, if not an injury. The grounds upon which this doctrine is applied here are so forcibly stated by the supreme court of New York, in the case of Jackson vs. McCall, (3 Cow. R. 75,) that I shall not add any thing to what is there said. That case involved the precise question here suggested. The declaration was returnable to the May term, 1823, and issue was joined on the 4th June, 1823. The sheriff's sale from which the defendant's title sprang, took place on the 2d October, 1818, but the sheriff's deed was dated 12th August, 1823, more than two months after issue joined. The court in examining the question, whether the deed could be admitted, without a plea *puis darrein continuance*, say "admitting that by relation it is to be considered as having been given at the time of the sale, does that dispense with the necessity of pleading the fact of delivery, according to its truth, *puis darrein continuance*." I am of opinion that it does. The defence relied on was the title acquired under the sheriff's sale. Where did that title vest in the defendant? If before the commencement of the suit, it was available under the general issue. If after issue joined it should have been pleaded *puis darrein continuance*, and the date or time of delivery of one of the evidences of title is perfectly immaterial. The legal effect and operation of such delivery is the matter of defence, and not the instrument itself. The legal effect of the delivery, then, in this case, having been to vest the title in the defendant, by relation, as of the 2d October, 1818, the matter of defence did not arise, subsequent to the joining of the issue, and need not be pleaded *puis darrein continuance*."

The acknowledgment of the deed is also objected to. The statute requires a sheriff to acknowledge a deed in open court, and the clerk is required to endorse upon the deed a certificate of such acknowledgement, under the seal of the court, and he is further required to make an entry of it, and in this entry to state the names of the parties, and description of the property. Here the clerk confounds the certificate which he is required to endorse upon the deed, and which need only be a certificate, that the within deed was acknowledged, with the entry he was required to make on his record, in which it was his duty to give a description of the land and the names of the parties. The latter was

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unnecessary to be placed upon the back of the deed, for the deed itself would give the necessary information on these matters. But shall a mistake in the description of the land affect the purchaser? The law imposes this duty upon the clerk, an officer of the court, over whom the purchaser has no control. The whole transaction of the sale, deed, acknowledgment and recording is confided to a set of public officers. It is not like an ordinary conveyance, nor does the statute requiring sheriff's deeds to be recorded,, and which by the by is of recent introduction, declare the consequences to the purchaser, of a failure to have it filed. The statute declares that the recorded deed shall be admitted in evidence without further proof, but says nothing about notice. We are of opinion that the certificate of acknowledgment was sufficiently certain, and that the clerical error, in the description of the land, will not vitiate it.

The remaining objection is, that the verdict and judgment were for the whole land mentioned in the declaration, whilst the proof showed the possession of the defendants to be confined to forty acres.

The instructions upon this point were clear and conceded to be correct. Indeed, no exception was taken to the instructions. The question of fact was the jury's, and we cannot interfere. The objection, it is obvious, is merely technical—for if the plaintiffs get a writ of *habere facias possessionem* for land of which the defendants do not claim the possession, the defendants will certainly not be injured thereby.

The other judges concurring, judgment is affirmed.

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1. Where a Spanish grant has been reported upon by the commissioners acting under the acts of congress of July 9, 1832, and March 2, 1833, and confirmed by the act of congress of July 4, 1836, the courts of this State cannot question the validity of such confirmation upon the ground that no survey had been previously made under the Spanish government.
2. The principle asserted in Boyce vs. Papin, 11 Mo. R. 16 recognized.

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3. The record of a suit for partition, between persons representing themselves as the heirs of a person, is evidence of the partition; but not of the heirships of the individuals so representing themselves; this must be proved by evidence *aliunde*.

ERROR TO PIKE CIRCUIT COURT,

GLOVER & CAMPBELL for plaintiff.

1st. There was no evidence in the cause showing who were the heirs at law of Antoine Dubreuil. The record of proceedings in partition was competent evidence to show a transfer of right from the parties thereto to Chauvette Dubreuil, but nothing more. The plaintiff ought to have shown *aliunde* the heirship of those parties.

2d. Dubreuil never acquired any right legal or equitable in any specified land by virtue of his concession from the Spanish government. 10 Peters 329; Ib. 338; 7 Mo. R. 102; consequently his claim was not cognizable by the board of commissioners under the act of congress, July 9. 1832.

3d. There was no evidence before the court that the claim of Dubreuil had been reported on favorably by the board of commissioners, and of course none that it had ever been confirmed by the act July 4, 1836.

4th. It is not deemed that the act of 4th July, 1836, is a statutory grant, and when the claim confirmed thereby can be located by the terms of the order or concession, or by a survey made prior to said act, it vests a complete title in the confirmee; but here is no means of identifying the lands granted.

The claim is confirmed, but it is impossible to tell where or what it is; it is therefore void for uncertainty. 7 Mo. R. 14; 6 Peters 245; 3 Howard 660.

5th. The paper introduced by the plaintiff as a survey is not a survey by lawful authority and is void. There was no law by which the surveyor general was empowered to survey this confirmation and make that good by his act which was void at the date of the alleged confirmation. 7 Mo. R. 102; 6 Howard 660.

We know that if the government of the United States have recognized the survey of 1836 as binding upon them, that the defendant will not be permitted to object, but we contend it has never done so.

If the act of congress July 4, 1836, did not pass the title to the land, the unauthorized act of the surveyor could not.

CARTY WELLS for defendant.

1st. The recommendation of the board of commissioners with the act of 4th July, 1836, constitute a complete grant of the land to Dubreuil.

2d. The plat offered in evidence being a copy of the record of surveys from the books of the surveyor general is conclusive evidence of the location of said grant.

The act of congress of 18th May, 1796, appoints a surveyor general for the lands N. W. of the Ohio 1 Vol. Land Laws page 50-51.

The 2d section requires him to cause all public lands to be surveyed into townships, sections, &c., and to record the plats thereof in his office in a book to be kept for that purpose; a copy of which is to be kept in his office for public information.

The 7th section of the act of 15th February, 1811, authorizes the surveying of the public lands in Louisiana in the same manner as in the above act. Land Laws 1 volume page 183.

The 10th section of same act reserves from sale Spanish land claims; page 184.

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The act of 29th April, 1816, appoints a surveyor general for Illinois and Missouri, extends to him the power granted by the act of 18th May, 1796, and requires him to survey all grants before or after that time confirmed.

The survey offered in evidence has been made and certified under the laws of congress and is at least *prima facie* correct, and it cannot be inquired into by a mere trespasser.

It is doubtful whether such a survey is not conclusive between parties claiming under the U. S., until legally set aside by some competent tribunal. It is a thing adjudicated by a competent tribunal, and the public plat is a public record of that judgment.

It surely cannot be disturbed by one claiming no title.

NAPTON, judge, delivered the opinion of the court.

This was an ejectment to recover a small portion of a larger tract, supposed to be confirmed to the heirs of Antoine Dubruiel. The title which the plaintiff produced on the trial was as follows :

1. The proceedings of the board of commissioners in 1811, by which it appeared that, on Dec. 17, 1799, Antoine Dubruiel presented a petition to the lieutenant governor Delassus, stating that being desirous of establishing salt works on the river Aux Boeuf, (Buffalo Creek) about thirty leagues from St. Louis, he desired a grant of one hundred arpens square on said river, located in such a way as to the petitioner might seem most advantageous for his purposes. On the 19th, (two days after the date of the petition) the lieutenant governor granted the petitioner *the land he solicited*, and as there were no settlements, he was relieved from the usual duty of having it immediately surveyed, but it was enjoined upon him to have it surveyed without delay so soon as a settlement was made by any one. The surveyor general, Soulard, was directed to take notice of this title. In addition to these, there was before the board, as the minutes show, a plat of survey of 10,000 arpens, dated 24th February, 1806, signed Fremon Delauvriere, deputy surveyor. The claim was rejected in 1832, the last board of commissioners took up this claim and examined witnesses relative to it. Pison testified that in December, 1803, he accompanied Rankin, a deputy surveyor to survey this and other tracts ; that they were prevented from surveying this tract, being driven off by a party of Indians. This witness saw kettles, furnaces, &c., on the land, and understood that the land was afterwards surveyed by Delauvier. Delauncey swore that to the best of his recollection, Dubreuil went on the land before the change of government, in 1802, as he thinks, for the purpose of making salt, but was driven off by the Indians. Fremon Delauvriere swore, that in 1802, he furnished Dubreuil with ten salt kettles, oxen, carts, &c., and that Debrel and his hands built a house on his concession at Buffalo Creek,

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erected furnaces and made salt, and lived there until February, 1803, when they were driven off by the Indians, who killed the oxen, burnt the house and broke the kettles. Several months after this, witness went down in a pirogue to get what the Indians left, and found seven kettles. Witness further stated that in February, 1806, upon the application of Dubreuil, he proceeded to this land and surveyed it, and this survey is the same now on the books of the surveyor general. This witness was a deputy surveyor in 1805 and 1806.

The board recommended this claim for confirmation, and by the act of July 4, 1836, this claim was confirmed.

2. The proceedings of the circuit court of Pike county, in making partition of this tract among the heirs of Antoine Dubreuil, showing that the piece in controversy was assigned to Chauvette Dubreuil.

3. A deed from Chauvette Dubreuil to the plaintiff.

4. A plat of survey, to which was appended the following certificate : "Surveyor's office, St. Louis, 8th March, 1844. The above diagram of survey No. 3178, in Ts. 53 and 54 N. Rs. 1 and 2 W. of 5th pr. m. of 10,000 arpens confirmed to Antoine Dubreuil or his legal representatives, and showing its position in relation to the lines of the adjoining public and private surveys, is conformable to the field notes of the said survey on file in this office, which have been examined and approved, as returned by Joel Campbell, deputy surveyor, under instructions from the surveyor general of this district, dated the 17th of November, 1837. Silas Reed, surveyor of public lands in the States of Illinois and Missouri."

5. The defendant was proved to be within the lines of this survey.

This was the plaintiff's title. Upon the cross-examination of the plaintiff's witnesses, who proved the defendant to be in possession, the defendant attached Campbell's survey. The witness was present at this survey, and no corner was seen, nor any traces of a previous survey. The defendant then asked of the court these instructions :

"That there is no evidence of any legal title in the plaintiff. That unless the plaintiff has shown a survey under the Spanish government of the grant of Antoine Dubreuil, embracing the defendant's possession, he cannot recover. That there is no evidence before the court showing what land was confirmed to Antoine Dubreuil under his grant of 10,000 arpens, by act of July 4, 1836."

These instructions were refused and exception taken.

The defendant then proceeded with his evidence, explanatory of the nature of Delauriere's survey in 1806, and Campbell's survey in 1837.

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Spencer testified that he and his father and Fremon Delauriere and another Frenchman went down from Fremon's lick, (now in Ralls county) in the spring of 1805 or 1806, to the Mississippi river, that they descended the river in a perogue to where the town of Louisiana now stands, that they went ashore on a spot, nearly opposite the place where the store of Phineas Block now stands, that Fremon D. had a compass, marked a tree and set his compass; that he asked his witness' father, if the course he set his compass would include the lick, to which old Spencer said yes; that they re-embarked and went down the river, and this was all the survey of which witness had any knowledge.

Basys, a chain carrier for Campbell, in 1837, stated that they commenced eighty-three rods above the mouth of Neix creek, on the Mississippi river; that he could find no corner at the spot of beginning, and Campbell made a stone corner; that the witness went around the lines and found no traces whatever of any previous survey, except the surveys of sectional lines by the U. S. surveyors.

Cunningham, a chain carrier for Campbell, testified to the same thing.

The defendant then introduced a certificate of pre-emption, given to the defendant in 1843, and signed C. C. Cady, register. This certificate stated that Archer had deposited in the office, proofs of settlement and right of pre-emption, under the act of congress of 4th September, 1841, and that he was therefore entitled to possession of the land therein described.

The plaintiff then, by consent, introduced other documents explanatory of his title.

1. A description list marked L., and a certificate from N. P. Taylor, dated land office at St. Louis, Reg. office, 21st March, 1842, certifying that the following quotation was a correct copy from a list of claims regularly entered in U. S. recorder's office, at St. Louis, as certified to the register of the land office at this place, by Frederick Bates, Esq., recorder over date of 10th July, 1818. The extract is this: "Claims to land in the old counties of St. Charles and St. Louis, including Howard, as to which congress has made no decision. Antoine Dubreuil, Recpt. p. 442, 10,000 arpens Aux Boeuf." In connexion with this, the plaintiff also produced in evidence copies of letters from the secretary of the treasury, (Crawford) in 1818, to the commissioner of the general land office (Meigs) and from the commissioner to the register, directing the register to reserve from sale all lands embraced in a descriptive list to be furnished him by the recorder of land titles. Seve-

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ral other documents were read, taken from the correspondence of the land department, and designed to show the number of entries and New Madrid locations which had been made upon this Dubreuil claim, and the opinions of the officers of the federal government in relation to them. As these papers are no wise material to the case, we shall omit any further account of them.

The defendant then asked several instructions, of which the court gave the following :

1. The concession to Antoine Dubreuil of 10,000 arpens, produced in evidence, gave said Dubreuil no right to any specific land whatever, and unless it shall appear from the evidence in the cause that a survey of said grant was made by the proper officer under the Spanish government, embracing the land in controversy, the verdict must be for the defendant.

2. Unless it appears from the evidence that a claim of Antoine Dubreuil was one of those claims reported on favorably by the recorder and commissioners, who acted under the acts of July 9, 1832, and an act supplemental thereto approved March 2, 1833, and entered in the transcript of decisions by the said recorder and commissioners to the commissioner of the general land office, the verdict must be for the defendant.

3. Unless it appears from the evidence that the persons named in the record of partition produced in evidence as the heirs of Antoine Dubreuil, are the heirs at law of the said Dubreuil, and all said heirs, the verdict must be for the defendant.

4. Conceding that the said claim of Dubreuil was embraced by the confirming clause of the act of July 4, 1836, unless the court shall find that some specific land was confirmed thereby to the said Dubreuil, the said confirmation was void for uncertainty, and no act of any executive officer of the government could render it valid afterwards.

5. If no survey designating the land granted to Antoine Dubreuil under the grant of 10,000 arpens produced in evidence, was ever made prior to the 4th July, 1836, there was no authority in any surveyor of the United States to survey said grant afterwards for the first time, and if such survey was ever made it was a nullity.

The court refused to give the following, which was also asked by the defendant :

There is no evidence before the court of any legal title in the plaintiff to the land in dispute.

The plaintiff had a verdict which the defendant moved to set aside ;

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but the court gave judgment upon the verdict, and the case is brought here by appeal.

It is probable that the bill of exceptions in this case does not give a correct statement of the disposition made of the instructions. The case was submitted to the court without a jury, and the verdict for the plaintiff can scarcely be reconciled with some of the instructions which the court is reported to have given. I have, however, copied the details of the plaintiff's title, and the defendant's evidence impugning it, from which we may infer the questions really involved in the case.

These questions are principally these: 1. Was a survey under the Spanish government essential to the validity of the confirmation or grant in 1836? 2. If not, was it essential, in order to the introduction of the survey of 1837, in evidence, that a definite location of the Spanish grant should have been made previous to the action of the board of commissioners, and the act of congress confirming their report.

The first question must be answered in the negative. It was immaterial to the validity of the confirmation in 1836, whether there had been a Spanish survey or not. This was a circumstance for the consideration of the commissioners, who were appointed to investigate the claim, and for the congress which subsequently passed upon it. The absence of such a survey might have induced a rejection of the claim by the commissioners or by congress; but they confirmed it, and the courts cannot inquire into the propriety or expediency of such a confirmation.

An opinion upon the second question is not required by the position occupied by the defendant in this case. The surveyor general was expressly authorized by law to survey confirmations of Spanish claims. A survey has been made and it is in evidence before the court. The defendant has no title, for his paper certificate of pre-emption in 1843 was a mere nullity. Why then look into the propriety of the survey? The federal government has ample power, and its legislature has provided ample means for setting aside the surveys of its officers, when they are thought to be injurious to the interests of the government. It is not believed to be any part of our duty to interfere, where the rights of our citizens are not affected. If the United States think proper to give away their lands, it is not for us to complain. It is a matter exclusively for the consideration of those interested, and it would be idle for this court to scrutinize the regularity of proceedings, in which no one but the United States and her officers are concerned. This principle has been re-

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peatedly avowed and acted on. Boyce vs. Papin 11 Mo. R. 16; Machlot vs. Dubreuil 9 Ib. 477; Hunter vs. Humphill 6 Ib. 106.

If the United States undertake to give away land which they have previously sold to another, the question assumes a different shape. There is no doubt that a purchaser from the government previous to 1836, has a right to contest this survey of the confirmation to Dubreuil, should such a controversy arise, the questions partially investigated in this case in the circuit court must be determined. It must then be decided whether the surveyor can locate a claim of this character, according to his fancy, or must be guided by localities fixed before the confirmation.

It may be observed, that in order to give a determined locality to the concession to Debrelil it does not appear to be essential that a survey *on the ground* should have been completed before the confirmation. The concession was a peculiar one; it was of 100 *arpens square*, upon Buffalo Creek. Now in 1806, or at any period after the lands in the region embracing Buffalo Creek had been sectionized, it would only be necessary to determine a *point and a course*, in order to place a hundred arpens square upon Buffalo Creek. When this was done, a plat of the whole survey could be made on the maps in the surveyor's office, as well as though a survey of all the lines had been made upon the land. The officers whose duty it was to dispose of the public lands in this vicinity could be advised of the locality of the grant, as the law required them to be, by plats from the surveyor's office, communicated first to the register of lands. The records of these officers would show whether this was done. The instructions of the surveyor general to his deputy, Campbell, and the field notes of the survey itself, would show the data upon which the survey was based. It would readily appear, whether the surveyor had made a survey according to his own fancy, or had followed the courses and distances settled by previous surveys.

The record of the proceedings in the suit for partition, between persons representing themselves as the heirs of Antoine Dubreuil, was evidence of the partition; but the heirships of the individuals named in those proceedings, must be proved by evidence *aliunde*. The defendant was not a party to that suit, and the preliminary facts necessary to authorize a judgment in that case, must be proved by other evidence than that record.

The other judges concurring, the judgment is reversed and the cause remanded.

DUNCAN vs. DUNCAN.—THOMPSON vs. RENOEE.

DUNCAN *vs.* DUNCAN.

APPEAL FROM CLAY CIRCUIT COURT.

STRINGFELLOW for appellant.

1st. The evidence shows conclusively, that the complainant is not the innocent and injured party. She was guilty as shown by uncontradicted evidence, not only of equal offences but of similar offences.

2d. If the divorce were properly granted, still the two slaves born after the marriage were improperly decreed to complainant.

WILSON for appellee.

Admitting that the divorce was properly granted, the question is, whether the negroes born after the marriage, followed the mother, or still belong to Duncan. On this, see 1st Marsh R. 532; 7 Monroe 232.

McBRIDE, judge, delivered the opinion of the court.

This case comes within the principle decided in the case of Nagel *vs.* Nagel. The decree of the circuit court will be reversed and the bill of the complainant dismissed.

THOMPSON *vs.* RENOEE.

1. A purchased a tract of land at a government land sale in 1819—paid one-third of the purchase money—the balance payable in instalments. Before the part payments became due A died and his widow completed the purchase with her own funds. A patent issued in the name of A. Held,
That the widow is not a stranger to the transaction. That a trust estate in the land equivalent to the amount paid by her resulted in her favor.
2. A person who takes title from the heirs of a patentee with knowledge that the purchase money was paid by another, becomes a trustee for the latter; and the land in his hands, stands charged with the trust as though no transfer had taken place.
3. Where a widow claims land in her own right, the fact that dower has been allotted to her, does not estop her or those claiming under her from asserting such right.

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ERROR TO CALLAWAY CIRCUIT COURT.

SHEELY for plaintiff.

The administrators of Philip Durtin having used the money of the widow of said Philip Durtin in paying for said land and taking the patent in the name of said Philip Durtin dec'd, created a resulting trust in favor of Mary Durtin the widow of said Philip. McGuire vs. McGowan 4 Desau 491; Perry vs. Head 1 A. K. Marshall 47; Letcher vs. Letcher's heirs 4 J. J. Marshall 592; Elliott vs. Armstrong 2 Blackford 198; Jemison vs. Graves 2 Blackford 440; Doyle vs. Sleeper 1 Dana 536; Boyd vs. McLean 1 J. C. R. 582; Botsford vs. Burr 2 J. C. R. 409; Pierce vs. Pierce 7 Ben Monroe 439; German vs. Gabbald 3 Binney 304.

The said two-thirds of the purchase money of said land having been furnished by said Mary Durtin, a trust was created by implication of law in her favor and her assigns stand in and occupy the same position occupied by Mary Durtin. See same authorities : Kisler vs. Kisler 2 Watts 323; Pinney vs. Fellows 15 Vermont 525; Fonblanques Equity 395.

A trust created by implication of law need not be in writing. Kisler vs. Kisler 2 Watts Rep. 323; Elliott vs. Armstrong 2 Blackford 198.

A purchaser of land with notice of an existing trust becomes himself a trustee notwithstanding the consideration he may have paid. See Murray vs. Ballow 1 John C. R. 566; Scobey vs. Blanchard 3 New Hampshire Rep. 170; Pritchard vs. Brown 4 New Hampshire R. 397.

REED & HARDIN for defendant.

The counsel for defendant contend that the court below committed no error for these reasons :

1st. The payment of the purchase money by Mary Durtin was not made by any consent of, or arrangement, or agreement with the heirs of her deceased husband. She was an intruder into the transaction and hence could create no trust of any kind in her own favor.

2d. It is clearly settled that a trust, not within the statute of frauds, and which may be shown without writing, results from the *original transaction* at the time it takes place and at no other time, and is founded on the actual payment of the money at the time of the purchase and on no other ground ; after a party has made a purchase with his own moneys or credit, a subsequent tender or payment of the money, cannot attach by relation, a trust, to the original purchase 4 Kent 305 and authorities cited in the marginal note. Rotsford vs. Burr 2 Johns Ch. Rep. 408-14 ; Steere vs. Steere 5 Johns Ch. Rep. 19.

3d. Mary Durtin, the pretended *cestui que* trust, at the death of her husband in 1821 was entitled to as her dower, there being no lawful issue, to the one equal half of his lands for and during her natural life. 1 Ter. laws of Mo. 509, act entitled wills, descents and distribution, section 1. About the year 1840 under the provisions of this statute, she submitted to and received her assignment of dower without plea or objection, and in 1843 sold to plaintiff in error the very lands allotted to her, as her dower. It would seem then that the matter of a resulting trust is a late consideration, an after thought, sprung perhaps by plaintiff in error in order to realize something from a loosing bargain. The facts of the case, indicate that Mary Durtin never claimed that she created a resulting trust, or if she did that she afterwards waived all such rights by the reception of dower.

McBRIDE, judge, delivered the opinion of the court.

David Thompson brought his bill in chancery in the Callaway circuit

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court, against Richard D Renoue, in which he alleges that at a sale of the public lands by the government of the United States, in the year 1819, one Philip Dirtin purchased a tract of land (describing it) containing about 180 acres at the price of \$2 per acre, for which he paid at the time one-third of the purchase money and received a credit for the remaining two-thirds; that before the falling due of the said balance, to-wit in 1821 or 1822, Dirtin departed this life leaving a widow, Mary Dirtin, who subsequently paid the balance of the purchase money for the land; that the patent issued in the name of Philip Dirtin. That the widow continued to reside on the land until the year 1840, when a petition was filed against her in the county court of Callaway county for a partition of said land, and at a subsequent term of that court, commissioners were appointed to allot and admeasure to the widow her part of said land, who after having made partition, reported the same to the county court, when the said court approved of and ratified the said partition. That in the year 1843, Mary Dirtin, for a valuable consideration, supposing the fee of said allotted land to be in her, sold, and by deed conveyed the same to the complainants, who went into possession and continued to hold the possession thereof, until the death of said Mary Dirtin, when he sold said land to one Bradley and put him in possession. That since the demise of said Mary, those claiming to be the heirs at law of Philip Dirtin deceased have proceeded to obtain partition of the real estate of said Philip, embracing the land purchased by complainant of Mary Dirtin, and under an order of the county court, a sale has been made of the entire tract of land purchased by Philip Dirtin of the general government, (the same not being susceptible of division,) and Richard D. Renoue the defendant became the purchaser thereof, and now holds the lands against the rightful claim of the complainant, notwithstanding the said Renoue was fully advised of all the facts set forth in the bill. That by reason of the sale last aforesaid, the complainant has been forced to rescind his contract with Bradley.

To this bill the defendant filed a general demurrer, which, upon argument was sustained by the circuit court, when the case was brought to this court by writ of error.

The facts set out in the bill being admitted by the demurrer, the question is whether they make out a case which entitles the complainant to the aid of a court of equity.

It is conceded that if a stranger had voluntarily paid the balance due on the land, no trust would thereby have been created in his favor; for it is not in the power of an individual thus to raise a trust for his bene-

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fit; but it is considered that the widow in this case sustained to the subject a different relation. She was entitled, under the statute, to a dower interest in the land purchased by her husband, and this interest would have been lost to her unless the credit payments for the land were met according to the terms of the sale. If the administrator of Philip Durtin had seen proper to pay the balance of the purchase money, then there would have existed no necessity for the widow to make the payment in order to save her dower. But if the administrator, either had not the means necessary, or having the means judged it most conducive to the interest of the estate, not to pay the balance, but let the land be forfeited for the non-payment, and to save her dower, the widow was compelled to raise the money and make the payments as they fell due, she is entitled by every principle of equity, either to a ratable proportion of the land thus paid for, or a lien upon it for the amount paid by her. Why is she not thus entitled? Her money has actually paid two-thirds of the purchase money for the land, and if she had not made the payments, it is probable that the amount paid by Philip Durtin in advance for the land would have been lost to his estate.

The estate therefore, instead of losing any thing by her acts, has profited by them. The distributees of Philip Durtin have no just cause to complain of this view of the subject, because the money paid by the widow constituted no part of Philip's estate, which by course of law would have descended to them.

The facts charged in the bill, make out, under the foregoing views, a clear case of resulting trust, in favor of Mary Durtin or those claiming under her, by bringing it within the rule that where an estate is paid for with the money of one individual and the title taken in the name of another, a trust arises in favor of the individual whose money has been used in the acquisition of the estate.

If we should regard Mary Durtin as a tenant in common with the legatees of Philip Durtin, and as having paid the balance of the purchase money, to save the land from forfeiture, her claim to indemnity from her co-tenants would be equally clear and conclusive. In either aspect, therefore, she is entitled to a ratable proportion of the land acquired by the purchase.

The bill further charges, that, the defendant Renoе, prior to his purchase, had notice that Mrs. Durtin had paid, out of her funds, two-thirds of the purchase money for the land in controversy; taking a title, with a knowledge of these facts, Renoе becomes a trustee for her; and

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the land in his hands, stands charged with the trust, as though no transfer had taken place.

We do not regard the proceedings in the circuit court, allotting her dower or making partition of the land (it being uncertain which object was in contemplation) as estopping her or those claiming under her, from setting up and insisting upon her claim as made in the bill. It is obvious enough, that the proceedings had in the county court were had under a misapprehension of the law governing the rights of widows to dower. The act of 1817 was in force at the death of Philip Dirtin, the husband, and under that act, the widow would only be entitled to a dower interest of one-half of the land; whilst under the act in force at the time of the proceedings in the county court, the widow would be entitled to one-half of the land absolutely; and it was under this last act that the partition was made. If her rights had really been what the commissioners and the circuit court supposed them to be, and what she appears to have acquiesced in, then most likely no question would have arisen in this case; but, after a sale of the land allotted to her, and her death, it is ascertained that if she held only a dower estate, under the act of 1817, her estate had terminated, and the land would revert der to the legatees of Philip Dirtin.

The judgment of the circuit court should, for the reasons aforesaid, be reversed, and the case remanded to the circuit court for further proceedings to be had not inconsistent with this opinion.

PENN vs. LEWIS.

1. The supreme court will not interfere with the verdicts of juries, found upon the weight of evidence where no instructions have been asked.

ERROR TO SALINE CIRCUIT COURT.

STRINGFELLOW for plaintiff.

The payee had the right to give the credit on such note as he pleased, and the offset ought

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to have been rejected, at all events, the \$45 for the horses and spoons ought to have been rejected, as it was argued that this amount should go as a credit upon another note. Whereas, in this case the former creditor had several demands, as to such payments as were not directed by the debtor to be especially applied the court will make the appropriations upon principles of justice and will so apply the payment as not to injuriously affect the rights of third parties. In this case, to apply the payment as done by the circuit court would be a fraud upon the assignee. 15 Wendell 19; 9 Cowen 409, 420, 747.

SCOTT, judge, delivered the opinion of the court.

This was an action of assumpsit brought by Penn against the defendants in error on an assigned promissory note. The cause was submitted to the court sitting as a jury. No instructions were asked and we are only required to review the finding of the court on the evidence.

The judge who heard the witnesses testify, knows best what weight is due to their evidence, and this case falls within that numerous list in which it has been held that this court will not interfere with the verdicts of juries.

The other judges concurring, the judgment will be affirmed.

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1. A receipt in full of all demands, raises a strong presumption that all previous dealings between the parties are adjusted. This presumption may be rebutted by direct *proof or strong circumstances*.

APPEAL FROM COOPER CIRCUIT COURT.

HAYDEN, for appellant.

1st. That the circuit court erred in permitting the plaintiff to give to the jury upon the trial of the cause, as explanatory of the receipts read in evidence by defendant, the testimony of Thomas Hanna, and the three accounts referred to by the witness, marked A, B and C, and the said note with the endorsements made by Gibson thereon as read by plaintiff.

2d. That the court erred in giving to the jury the said first instruction asked for by plaintiff and objected to by defendant.

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3d. That the court erred in not setting aside the verdict and in refusing defendant a new trial upon his motion therefor.

ADAMS for appellee.

To sustain the judgment of the circuit court the appellee will insist upon the following points and authorities :

That the receipts read in evidence by the debt below were only *prima facie* evidence that the account sued upon had been settled and they were subject to explanation. *Ensign vs. Webster* 1 J. C. 145; *House vs. Low* 2 J. R. 378; *Toby vs. Baber* 5 J. R. 68; *McKinstry vs. Pearsall* 3 J. R. 319; *Johnson vs. Weed* 9 J. R. 310; *Putnam vs. Lewis* 8 J. R. 389; *Shepherd vs. Little* 14 J. R. 210; 2d Tenn. Rep. 866; *Gerrish vs. Washburn* 9 Pick 388; *Badger vs Jones* 12 Pick 371; *Baugh vs. Brassfield* 5 J. J. Marshall 79; *Southwick vs. Hayden* 7 Cowan 334; 1st Greenleaf's Ev. sec. 305, *et passim*.

SCOTT, judge, delivered the opinion of the court.

This was an action begun in a justices court on a blacksmith's account by the appellee against the appellant, in which the appellee recovered judgment. On a trial in the circuit court the appellee again obtained a verdict which was set aside and new trial granted. On a second trial in the circuit court, the appellee succeeded in obtaining a verdict for \$82 92 debt and \$27 87 damages, on which a judgment was rendered, from which the appellant has appealed to this court.

The appellee's account amounted to \$116 62 on which there was a credit endorsed of \$33 33, being the interest up to June 1845 on a note for \$100 at ten per cent., held by the appellant against the appellee. The account commenced in August 1841 and was continued down to April 1846. Evidence was given tending to establish the account. The appellant then read these receipts from the appellee, dated respectively 16th August 1843, March 7th 1845 and November 9th 1845, and severally for the sums of \$11 42, \$29 62 and \$5 71. These receipts were in full of all demands up to their respective dates. A tender of payment of the two items of the account of a date subsequent to that of the last receipt, was admitted. The appellee then, to explain said receipts, introduced a witness who testified that the appellee was a blacksmith, that he, witness, kept the appellee's books, and most of the entries were in his hand-writing; that on the books there were accounts corresponding in amount with the receipts read in evidence; that the accounts corresponding in amount with the first two receipts in point of date, are included in the amount sued on. Witness further stated that he knew of no payments being made on the said

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accounts. It appears that the accounts were credited by payments on the book. The appellee also read in evidence a negotiable promissory note for \$100 given by appellee to appellant, which is as follows:

" Seven months after date we or either of us promise to pay to William Gibson or order the sum of \$100 for value received, negotiable and payable without defalcation or discount, with interest after due at the rate of ten per cent. per annum until paid, this 3d Aug. 1841.

ISAIAH HANNA,
ELI C. HAMMOND.

On which note were endorsements of the payment of interest up to the 1st Nov. 1842 and first of June 1845. This note was afterwards, in Nov. assigned to J. Kingsbury, who sued for and collected the same. All the explanatory evidence was objected to by the appellant.

The court at the instance of the appellee gave the following instruction which was excepted to by the appellant, viz: that notwithstanding the plaintiff may have given the receipts read in evidence, yet they are only *prima facie* evidence that the account was settled in full, and may be explained, and if the jury believe from the evidence that the account sued upon or any part thereof remains unpaid, they must find for the plaintiff.

I do not see how this verdict can stand. Is it usual to give receipts for partial payments on a note and also to endorse the payment upon it? such a course may lead to difficulties. I recollect a case in which a receipt was given for a partial payment on a note and a credit for the same amount was endorsed on it, and, from the manner in which it was done, it was a matter of doubt whether the receipt and endorsement were for the same or different sums. Here are receipts for sums of money due on an open account, and because the payments are not endorsed on a note due to the person making the payment, and growing out of an entirely different transaction; therefore the presumption is that it was a fraud or mistake, and the party giving the receipt for the account is entitled to have it endorsed on the note. I know no principle which warrants such a conclusion. It is clear that it may be shown that such was the understanding of the parties; but in the absence of all proof, I am not aware of any rule which authorizes such an inference. One who has safely invested a sum of money bearing a high interest is not anxious to recall it, and he would prefer paying small accounts against him due his debtor, to giving him credit on his loan.

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The pecuniary circumstances of the creditor would shed light upon this matter and is a proper consideration for the jury.

The evidence of the witness explaining the book of the appellee was admissible. The fact that there were three accounts on the book corresponding in amount with the receipts, was evidence to show for what the receipts were given, especially as they were credited by payment, and with other evidence might have established a mistake in giving the receipt in full. The negative testimony of the witness that he saw no money paid, was, of itself, entitled to no weight.

The instruction, I think, should have been couched in stronger language. Where an open account is settled, the presumption is that all previous dealings between the parties are adjusted. But when a party not only settles an account, but takes a receipt in full of all demands, he should be in a better situation than when he takes a receipt only for an account without expressing it to be in full. In the case of Harden vs. Gordon, 2 Mason 561, Judge Story says that, when a receipt is given in full of all demands, it is not to be taken as conclusive: it is open to explanation, and, upon evidence, may be restrained in its operation. But the natural presumption is in its favor, and that presumption will prevail until it is displaced by direct proof or strong circumstances. So in the case of Thompson vs. Faussat 1 Pet. C. C. Rep., it was held that the proof must be satisfactory that a receipt in full was obtained by fraud, or was given under a mistake of facts. In the case of Fallen vs. Crittenden 9 Con. 406, it was maintained that the true view of the subject seems to be, that such circumstances as would lead a court of equity to set aside a contract, such as fraud, mistake, or surprise, may be shown at law to destroy the effect of a receipt. This view of the subject is commended by Greenleaf sec. 305, note. Now nothing is clearer than that he who goes into a court of equity for relief against a settled account on the ground of mistake, must establish the fact to the entire satisfaction of the chancellor. It is not sufficient that he presents a case which shows that a mistake might have occurred, but he must prove it to his satisfaction, so that the mind labors under no embarrassment in drawing the conclusion.

Without further evidence I do not think that the fact of the existence of the note and the endorsement upon it, should have weighed any thing with the jury.

As this seems to be a hard case on the appellant, I cannot but think that the ends of justice will be subserved by granting a new trial. The defendant has three solemn declarations under the hand of the plaintiff

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that he owed him nothing and it will conduce to the establishment of right to submit the case to a jury under the foregoing views.

The other judges concurring, the judgment will be reversed, and the cause remanded.

PLATTE COUNTY COURT *vs.* McFARLAND AND OTHERS.

1. The action of a county court, refusing to receive a report presented by commissioners appointed by the general assembly to survey and mark out a State road, is not a final judgment such as will sustain a writ of error.
2. A *mandamus* is the proper proceeding to compel county courts to do their duty respecting roads.

ERROR TO PLATTE CIRCUIT COURT.

ALMOND for plaintiff.

1st. The decision of said county court was not and is not such a decision as will legally entitle a writ of error to lie from the circuit to the county court thereon. It was not and is not a judgment at all, and is no bar to the future presentation and reception of the same report by said county court. See Easton *vs.* Chambers 1 M. R. p. 135.

2d. It was certainly cruel thus to create a case in the circuit court against the "Platte county court," and it was evidently wrong to render judgment against defendant for an error of judgment, supposing one to have been committed.

3d. There was no bill of exceptions filed in the county court, before the case arrived in the circuit court, to show upon what evidence or grounds the report was rejected. See Davis *vs.* Hays 1 M. R. p. 192.

4th. The assignment of errors by McFarland and others in the circuit court, and the action of that court seem to imply that the county court *ex necessitate rei*, ought to have received and acted upon the report.

5th. The commissioners, acting in a public capacity, and for the public, had no private right or interest affected by the decision of the county court, and had no right to their writ of error. And the question as to their pay was altogether a different question from the reception of the report. See Galloway *vs.* Overbeck & Shaw 10 M. R. 364.

6th. The circuit court had no right to revise the decision of the county court in this case, and if the circuit court has any control over the county court in reference to this road, it can only be exercised by writ of *mandamus*, commanding the county court to receive said report.

7th. If the precedent is established of taxing the county court with the costs in this case for a wrong decision, supposing it to be wrong, it might be extended to the circuit courts, which would prove most disastrous.

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8th. But the county court decided correctly. For

1st. If the evidence before the county court had been preserved, it would be seen that Shaw, the objector, had private rights affected, and his objections were sustained by proof. And

2d. The private act of the legislature is no where preserved upon the record establishing said State road, but is found on page 334 of Laws of Missouri of last session of the legislature. And from the report it will be seen that only Bailey and Allen met as required by the second section of said act.

3d. Bailey and Allen then having met at the time and place designated in the second section of said act and complied with all its requirements, "constituted a quorum, and were competent to perform the duties by said act assigned to the three commissioners." And

4th. Ferrill, by failing to meet at the time and place, evidently lost his capacity as commissioner; it having centered in the other two who did thus meet.

5th. Allen does not join in the report, but Ferrill at a subsequent day comes up after he was *functus officio*, qualifies and aids in appointing McFarland.

6th Even supposing that Ferrill had a right to act as commissioner after he thus qualified, clearly he and Bailey had no right to appoint McFarland.

7th. The special act gave them no authority to make such an appointment, and only upon failure of said commissioners or a majority of them to meet as required by the second section of said act, were they authorized to act under the general law. See seventh and last section of said act.

8th. McFarland and Ferrill then were not authorized to act as commissioners.

9th. Said report is deficient in this that the pretended commissioners did not obtain a relinquishment of the right of way from various persons, nor did they legally assess the damages of those persons.

10th. As the county of Platte had and has to foot all the damages as occasioned by the location of said road, the county court did right in requiring the commissioner strictly to conform to the law. See Rev. Code page 972-973-974, sections 3, 13, 16.

WILSON & REES for defendants.

Our first point is, the report is strictly correct and conforms to every requisition of the law. See Rev. Statute 504; Roads and Highways, art. 2, secs. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 to 36 inclusive.

2d. The commissioners had such an interest as authorized them to appeal and litigate the case. The defendants had no such interest. See Gallaway vs. Shaw & Overbeck, 10 Mo. Rep.

3d. William B. Almond had no such interest: not even the color of pretence of interest, and consequently had no right to except to the opinion of the court. Nor had he a right to bring the case here by writ of error.

4th. There is nothing in the motion; the overruling of which is complained of and made the sole ground for exception. The court did right to overrule that motion.

5th. The proper parties are not made on the record. Coleman Shaw is the only party. See the record.

SCOTT, judge, delivered the opinion of the court.

McFarland and others being commissioners under an act of the last

PLATTE COUNTY COURT vs. MCFARLAND AND OTHERS.

general assembly to survey and mark out a State road from Weston, in Platte county, to St. Joseph, in Buchanan county, made a report of their proceedings to the county court of Platte county, and filed a report of their survey of the said road. This report for its alleged irregularity, was rejected by the court, and further time was given to the commissioners to make a report. On the coming on of this report certain objectors resisted it, and the court again refused to receive it. On this the commissioners sued out a writ of error from the circuit to the county court. The writ is directed to the justices of Platte county court. On the return of the writ, the cause is docketed as one against the county court of Platte, and on the hearing of it, the judgment of the county court rejecting the report of the commissioners is reversed, and a judgment for costs is rendered. On this judgment a writ of error was sued out from this court.

It is impossible to discover any principle on which the county court of Platte could have been made a party to the writ of error. The judgment of the circuit court itself shows the fruitlessness of the proceedings by writ of error; for after reversing the judgment of the county court, the parties are left just where they were before the writ was sued out, and the making of costs is the only effect of it.

When such consequences result from a procedure, it is obvious that it must be irregular. The action of the county court could in no sense of the term be called a final judgment, such as will sustain a writ of error. The defects in the report or proceedings of the commissioners might have been obviated. A *mandamus* was obviously the proper proceeding to compel the county court to do its duty.

There being an error in the rendition of the judgment of the circuit court, and it appearing upon the record that it was unwarranted, by repeated decisions of this court, no motion was necessary in order to subject it to the revision of this court.

The other judges concurring, the judgment will be reversed.

HOWE & WALLACE vs. WAYSMAN et al.

HOWE & WALLACE vs. WAYSMAN et al.

1. If a father in failing circumstances *purchases property with his own money and has it conveyed to his minor children*, it is void as to subsequent purchasers of the property from him and as to his subsequent creditors.
2. A *bona fide* purchaser for a valuable consideration, is protected under the statute of 13th and 27th Elizabeth, as adopted in this country, whether he purchases from a fraudulent grantor or a fraudulent grantee.

APPEAL FROM COOPER CIRCUIT COURT.

HAYDEN for appellants.

1st. As against the appellants, John H. Howe and Robert Wallace, the bill of sale of the negro woman Charlotte, in the year 1829, by Shackleford to the infants, Hetty Howe, Martha Ann and Andrew J. Howe, under the circumstances thereof, is fraudulent and void. See Mo. Digest 1825, page 401-2, sec's 2 and 3, title, Fraud ; 1 Marshall 209-10, Mason & wife vs. Baker ; 1 Dana's Rep. 531 ; 4 McCord 294 ; Hudnal vs. Wilder, Ex'r. 1 Hill's R. 143-4 ; 5 Peters Rep. 264, 278, 281, Cathcart et al vs. Robinson ; Hovenden on Fraud, p. 956 ; 15 Mass. R. 310, Gates vs. Gates ; 2 Fick. 414 ; 1 Story's Eq. sec's. 348, 352 ; 3 Wendell 411 ; Roberis on Fraudulent Conveyances 422 (note) 420-1 ; 1 Maddock's ch'y. 271, 2, 3, 4 ; 4 Eng. Ch. Cond. R. 264-5, Richardson vs. Small ; 14 Mass. R. 137, Bicker vs. Ham and others ; 2 Cowper's R. 432, Cadogan vs. Lennett : 10 John Rep 457, 461 ; 18 John R. 403.

2d. The circuit court erred in permitting the plaintiffs to read to the jury upon the proof offered by plaintiffs, the copy of the bill of sale, purporting to be made by Edmund Shackleford, to the said Hetty, Martha Ann and Andrew J. Howe, in lieu of the original bill of sale.

3d. The court erred in permitting plaintiffs to read to the jury, the parts of said deposition of said James Howe, which was read by them, and in refusing the defendants the liberty, afterwards, to read to the jury the said several and every of the parts thereof, which they proposed to read to the jury.

4th. That the court erred in rejecting the proofs offered by defendants conduced to show their title to the negroes derived under the purchase and bill of sale thereof in April, 1831 from said James Howe for a fair, full and valuable consideration, as also the evidence offered by them conduced to show the insolvency of said James Howe at the time of purchasing Charlotte from Shackleford, and that the same was made with an intent to cheat and defraud not only his creditor, but also subsequent purchasers thereof, and in trust for his own use and benefit.

5th. The finding of the jury was and is against law and evidence.

LEONARD & ADAMS for appellees.

1st. The statute against fraudulent alienations, avoids conveyances and not purchases. It is a new pretence to say that a purchase made to conceal property from creditors, is a conveyance within the meaning of the statute. A purchaser can only attack as fraudulent the conveyances of those under whom he claims, and not conveyances of third persons from whom he derives no title. Here the defendants claim as purchasers from James Howe; who

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was no party to the conveyance under which the plaintiffs derive their title, and which it was purposed to impeach as fraudulent by the rejected evidence.

Revised Laws of Missouri of 1825.

Allison vs. Bowles 8 Mo. Rep. 346; Kenningham vs. McLaughlen 3 Mo. Rep. 31; Halbert vs. Grant 4 Mon. Rep. 590; Forsyth vs. Kreakbaum 7 Mon. Rep. 79; Crozier vs. Young 3 Mon. Rep. 158; Crozier vs. Bryant 4 Bibb. Rep. 174; Orr vs. Pickett 3 J. J. Marshall Rep. 280, 5 J. J. Marshall Rep. 87; McCrary vs. Parcell 1 Marshall Rep. 114; 3 Littell Rep. 10; Roberts on Fraud conveyances 463, 421.

2d. If this were otherwise and the creditors of James Howe were at liberty to follow their debtors money into the property purchased with it, upon showing that the purchase was made to defraud them, that would furnish no ground for conferring the same rights upon a subsequent purchaser from him. Admitting for the present that a creditor who has been wronged by a fraudulent purchase, may, at common law, follow his debtors property through every change it is made to assume, this is no reason for conferring the same privileges upon a subsequent purchaser.

3d. James Howe was the father of the plaintiffs, and as such, their natural guardian during their minority. His possession was their possession. Here the rule "*caveat emptor*" applied and if the defendants acquired no title, their remedy is by suit against him and not by annihilating our title.

Authorities above cited: Chism vs. Wood, Hardin's Rep. 531.

Scott, judge, delivered the opinion of the court.

This was an action of trover brought by the appellees on the 5th February, 1846, against the appellants for three slaves, Charlotte and her two children, Woodson and George.

Waysman and Roy, two of the appellees, are sons-in-law of James Howe, having intermarried with his daughters Martha Ann and Hetty. The other appellee, A. J. Howe, is a son of the said James Howe. The appellees claimed the slaves in controversy under a bill of sale executed to them by Edmund Shackelford, in Kentucky, for the slave Charlotte, who, after the sale, bore the two children, Woodson and George. The bill of sale was dated 28th July, 1829. Howe, the father, testified that he was the only guardian of his two daughters up to the time of their marriage, they being minors when the slave Charlotte was conveyed to them; and that he was still the natural guardian of A. J. Howe, who is also a minor. He further testified to facts tending to prove the execution of the original sale bill by Shackelford, after which a copy of it was read in evidence. The slaves were with James Howe until he sold them to the appellants, who were, it was admitted, in possession of them. The defendant then offered in evidence a bill of sale of the slaves Charlotte and Woodson, executed by James Howe, the father of the appellees, to the appellant, John H. Howe, on the 2d April, 1831, for the sum of \$400, which was excluded by the court. The appellants

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then to show title to Charlotte in James Howe, the father, offered to prove that in July, 1829, and before that time the said Howe was greatly indebted and insolvent in the State of Kentucky, that with his own money and with no part of the money or property of the appellees he purchased the slave Charlotte from Edmund Shackelford and procured the said Shackelford to make the bill of sale to the appellees, with the design and for the avowed purpose of shielding the said slave Charlotte from his Howe's creditors; that he took possession of said bill of sale and of the said slave Charlotte and brought her from Kentucky to this State, where he sold her and her child Woodson to the appellant John H. Howe, for the price of \$400, which was their full and fair value at the time, and without notice of the conveyance by Shackelford to his children. This evidence was likewise excluded. There was a verdict for the appellees for the value of the slave's and their hire. The appellants having saved exceptions to the opinions of the court, after an unsuccessful motion for a new trial brought the case to this court.

This court is impressed with the importance of protecting the rights of infants, who, besides their natural infirmities, labor under legal disability imposed on account of their want of discretion. No system of jurisprudence which did not make such a class of citizens an object of its peculiar care, could commend itself to our reverence or affection. Bona fide gifts and conveyances to minor children living with their parents, they being their natural guardians, are not affected with fraud, merely from their want of possession. The possession of the father is regarded in law as the possession of his infant child. But as a gift or conveyance may be fraudulent when possession is actually delivered to the donee or alienee, so an imputation of fraud may be made where there is a gift or conveyance by a father to his infant children living under his protection and control. A father may make a valid gift to his children, but its validity is always liable to be questioned. The claims of affection must be postponed to those of justice. Such transactions are narrowly watched for the inducements to them by those in adverse circumstances are so great, that the claims of justice would be in constant danger of a sacrifice if they were permitted to pass without a rigid scrutiny. Had the conveyance in this case been made directly by the father to his children, there can be no doubt it might have been attacked for fraud by those who were injured by it. Can the circumstance that the father instead of making it directly, sold his property and with the proceeds thereof made the purchase in the name of his children, affect the question. That which is prohibited from being

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done directly is prohibited from being done indirectly. Why should a man be prohibited from giving his estate away to the prejudice of his creditors, and yet be permitted to sell it, and with the proceeds purchase property in the name of others. Is it not the same thing in effect; as evidence was offered to show this transaction fraudulent, we are to regard it, as the case now stands, as actually proved. If, then, it was fraudulent as to those affected by it, it is as though it had not been done. The property is where it was before any thing was done. The intricacy of the machinery, the number of instruments employed in effecting the conveyance can make no difference. In Cadogan vs. Kennett Cwp 434, Lord Mansfield observed that the principles and rules of the common law are as strong against fraud in every shape as the statutes of 13 and 27 of Elizabeth, and those statutes are considered as only declaratory of the common law. So in the case of Hamilton vs. Rupress, 1 Cr. 99, Chief Justice Marshall held that the statutes of 13 and 27 of Elizabeth were only declaratory of the common law. In Fermer's case, 3 Coke 78, it was held that the common law doth so abhor fraud and covin, that all acts, as well judicial as others, and which of themselves are just and lawful, yet being mixed with fraud and deceit, are in judgment of law wrongful and unlawful. The conveyance then being fraudulent, it is void according to the principles of the common law. If the contrivance adopted in this case has been effectual to screen property from creditors, would it not have been resorted to in numberless instances. A case exactly like the present has not been found in the books after some search. Who does not see that such a principle would lead to consequences entirely subversive of all confidence and credit among men. Who would give credit if it was deemed fair and lawful to place property beyond the reach of creditors as was done by the parties to this transaction ?

It will be observed that this case differs from those relied on by the appellees. The aid of a court of equity is not solicited in behalf of creditors for property placed *beyond* the reach of an execution at law by the contrivance of their debtors. But a right is here asserted by those claiming under a conveyance alleged to be fraudulent, and an attempt founded on the manner in which the conveyance has been effected, is made to prevent an inquiry into the transaction. The case of McKeeny vs. Pursley 1 A. J. Marshall 114 decides nothing more than that a person to avoid a fraudulent conveyance must show himself a creditor or purchaser. The case of Crozier vs. Young, 3 Mon. 157 is more alike that under consideration, and deserves some attention. That

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was a bill to set aside a purchase of bank stock made in the name of his children by a debtor in failing circumstances. The bill was dismissed and Roberts on Fraudulent Conveyances and Croke Car. 550 were cited in support of the decree. The case of Crisp vs. Pratte in Croke furnishes no aid in support of the grounds assumed by the court. There was a special verdict in the case, and no fraud being found, it was held that none could be presumed, and all the judges base their opinion upon the absence of fraud. That too was a case under the act of 21 Jac. in relation to bankrupts. The dictum in Roberts is founded on what fell from the Lord Keeper in the case of Fletcher vs. Sedley, 2 Ver. 490: Lord Hardwicke afterwards in the case of Peacock vs. Monk 1 Ves. Sen 130, speaking of this last case, says it was only the inclination of the court on the argument of counsel, and it would be dangerous to allow the arguments there. Indeed, it is impossible to read the case of Crozier vs. Young without coming to the conclusion that its doctrines are at variance with what is understood to be the well settled law of the day. The cases on this subject are collected by chancellor Kent in the case of Bayard and al vs. Hoffman and al, 4 John C. 450. The doctrine that a man may make a fraudulent purchase, and that he may make a settlement of choses in action in fraud of his creditors, it will be obvious from an examination of the cases, is founded on the notion which prevailed in early times, that money and such things were not subject to execution, and therefore a creditor could not be injured by such acts as the law afforded no process for reaching them. In the case of Bean vs. Smith, 2 Mason, 274, Judge Story asks is it true that the grantee can appropriate the proceeds of a sale to his own use or to the secret trusts of the fraudulent conveyance against a judgment creditor. Will not a court of equity decree that the fraudulent grantee shall account to the judgment creditor for the amount of the proceeds of the sale, considering them as a mere substitute for the original fund. It appears to me, he says, that such a course is within the established doctrine and practice of the court. Equity will permit a creditor of an estate to sue the debtor, where there is collusion between the latter and the executor; a fortiori it will sustain a suit where the very fund appropriated by law for the payment of the debt is withheld by a fraudulent grantee. In the case of Bayard vs. Hoffman above cited, chancellor Kent comes to the conclusion from a review of the cases, that the doctrine is not law, that voluntary settlements of property which a creditor could not reach by legal process are valid against creditors, even if made by insolvent debtors. He ob-

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serves, he would be sorry to find this the doctrine of the court. It seems to be too encouraging to fraudulent alienations, and a debtor under the shelter of it might convert all his property into stock and settle it upon his family in defiance of his creditors, and to the utter subversion of justice. Money may too, now, be taken in execution. Turner vs. Fendall, 1 Cr. 117, Hardy vs. Dobbin 12 J. R. 220, Means vs. Vance 1 Bay S. C. Rep. 39.

It was contended that although creditors might avoid such conveyances, yet there is no reason for conferring the same privilege upon a subsequent purchaser. In 4 Kent's Commentaries 464, it is said that it is now the settled American doctrine, that a bona fide purchaser for a valuable consideration is protected under the statutes of 13 and 27 Eliz. as adopted in this country, whether he purchases from a fraudulent grantor or a fraudulent grantees, and that there is no difference in this respect between a deed to defraud subsequent creditors and one to defraud subsequent purchasers. The cases of Anderson vs. Roberts 18 John and Bridges vs. Eggleston 14 Mass. 245, maintain the same doctrine.

There were some minor points made in the brief of the appellants, but as they were not noticed in the argument and as the grounds of them were not stated, they will not now be determined especially as the question ruled will on a future trial obviate their recurrence.

The other judges concurring, the judgment will be reversed and the cause remanded with directions to the judge below to receive the evidence of fraud excluded on the former trial.

BAILEY vs. THE TRUSTEES OF LINCOLN ACADEMY.

1. The statute of this state making the printed statute book evidence of private statutes does not dispense with the requirement of the common law that they must be produced in evidence.
2. A mortgagor and those claiming under him are estopped from saying that no title was conveyed to the mortgagee.

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ERROR TO LINCOLN CIRCUIT COURT.

CARTY WELLS for plaintiff.

1st. That in all cases the mortgagee has a right to foreclose his mortgage and to sell whatever interest the mortgagors have conveyed to him. See the statute.

2d. That the question as to what title was conveyed by the mortgage, or whether any, cannot in this proceeding be inquired into.

3d. The makers of the deed are estopped from saying that they conveyed no title.

4th. The trustees are sued and not the corporation, if there be one, and they may hold this property by conveyance from some person, for this very purpose and with power to dispose of it in this very manner. These are questions which cannot arise here.

5th. The judgment of the court will be to sell whatever title the mortgage conveyed and the purchaser can then inquire into that right. It is given to the mortgagee as a security for his debt and he has a right to sell it.

6th. It is no encumbrance on the title. If it be encumbered at all, it is done by the mortgage.

PORTER for defendant.

The paper set out in the petition as a mortgage is not the deed of the corporation, because it is not sealed with the corporate or common seal of said body. A corporation cannot make a valid deed or covenant without the use of its common seal, or seal ordered to be used for the particular case. Perry vs. Price 1st Mo. R. P. 664; Van Vechten vs. Randall or rather Randall vs. Van Vechten 19 Johnson's R. P. 60.

It must appear on the face of the deed that the seal used is the seal of the corporation, or seal ordered to be used as such in the particular case. But suppose it could be proven by evidence other than the deed, it would surely be necessary to allege in the petition that the impression used was the common seal of the corporation, or seal ordered by it to be used for the special case. If not so alleged, the proof could not be introduced.

It is the seal, and seal only which unites the several assents of those who compose a corporation aggregate, and makes a joint assent of the whole. 1st Chit. Blac. top p. 386.

A corporation aggregate cannot convey real estate, nor appoint an agent to do an act in which real estate is concerned, without the use of its corporate seal. Kyd on the law of corporations.

The paper set out in the petition does not purport to be sealed with the corporate seal, but with the private seal of each who executed it.

Now is the paper set out in the petition, the deed of the individuals who subscribed and sealed it.

1st. Because it shows that they intended to act as trustees.

2d. Because the paper contains an express agreement that they are not to be personally liable under any circumstances.

Agents or trustees are never personally bound unless they act without the sphere of their authority, and create no liability on the part of their principal. Walker vs. Swartwout 12th Johnsons R. P. 444; Olney vs. Wicks 18 Johns R. P. 122; Randall vs. Tan Vechten 19 Johnsons R. P. 60.

The question in this case under the last stated principle, is not not whether the security

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which the trustees intended to give for the balance of the debt, is binding on the corporation, but whether the contract on which the demand accrued is so binding. That the corporation is bound for the debt, and liable to the action of assumpsit, there can be no doubt. Danforth vs. Schoharie Turnpike Company 12th Johnsons R. P. 227; Randall vs. Van Vechten 19 Johnson P. 60.

SCOTT, judge, delivered the opinion of the court.

Bailey the plaintiff filed a petition against Wing and others defendants to foreclose a mortgage executed to him by them as trustees of Lincoln Academy. The mortgage is as follows:

"Know all men by these presents, that we, Richard H. Woolfolk, Horace B. Wing, Emanuel Block, Valentine J. Peers and Francis Parker, Trustees of the Lincoln Academy, in the county of Lincoln and State of Missouri, for and in consideration of the sum of eleven hundred and ninety-two dollars to us in hand paid as trustees aforesaid for the use and benefit of said academy by David Bailey of said county and state, have granted, bargained and sold, and do by these presents grant, bargain and sell as effectually as we as trustees aforesaid can dispose of, four certain lots of ground situate, lying and being in the town of Troy in said county of Lincoln known and designated as Collin's addition to said town as lots numbered (336) three hundred and thirty-six, (337) three hundred and thirty-seven, three hundred and fifty, (350) and (351) three hundred and fifty-one, on which lots the Lincoln Academy is situated. To have and to hold the said lots of ground together with the improvements thereon situated unto him the said David Bailey his heirs and assigns forever. The condition of these presents are such that whereas the said sum of eleven hundred and ninety-two dollars is due to said David Bailey as a balance for building the said academy. Now, therefore, if the trustees aforesaid or their successors in office shall pay or cause to be paid to the said David Bailey or his legal representative on or before the first day of January in the year one thousand eight hundred and forty, the said sum of eleven hundred and ninety-two dollars, with ten per cent. interest thereon from the date hereof until paid, then this deed of mortgage to be void and of no effect. It is expressly understood that we as trustees aforesaid are not to be personally liable for the payment of said sum of money due to said Bailey, in any manner whatever.

In testimony whereof, we, as trustees aforesaid, have hereunto set our

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hands and affixed our seals this thirtieth day of December eighteen hundred and thirty-seven.

Signed,	RICHARD H. WOOLFOLK,	[SEAL.] [no]
	HORACE B. WING,	[SEAL.] [ad]
	EMANUEL BLOCK,	[SEAL.] [A]
	V. J. PEERS,	[SEAL.]
	FRANCIS PARKER.	[SEAL.]

The petition after setting out the mortgage avers that there is a balance due the plaintiff of \$305 80; that the mortgage has become forfeited; that the mortgagors were seized of an estate in fee in the mortgaged premises for the benefit of the said Lincoln Academy. That some of the original trustees had been replaced by successors who were made defendants, and prays for a foreclosure of the equity of redemption. To this petition there was a demurrer filed which being sustained the cause was brought here.

It appears that the ground on which the demurrer was sustained, was, that the execution of the mortgage was a corporate act, and that it could have only been evidenced by annexing the corporate seal. It is clear that a corporation can only convey lands by deed, and that its assent must be evidenced by its common seal. But we do not consider that this principle is applicable to the present case. There is nothing on the face of the petition which shows that the defendants were ever incorporated. The statute creating the corporation is a private one and must be given in evidence. The act making the printed statute book evidence of private statutes does not dispense with the requirement of the common law that they must be produced in evidence.

The defendants having executed the mortgage they certainly appear with a bad grace in denying that they had any authority to do so. It is a general rule that a mortgagor and those claiming under him are estopped from saying that no title was conveyed to the mortgagee. In executing the instrument they hold forth that they have title or authority to convey, and that title whether good or bad, the mortgagee is entitled to. This proceeding affects no body but the parties to it. If the defendants had no right to convey, nothing will be sold under the judgment in the case, and the purchaser will be defeated in an action of ejectment against the corporation. Had this suit been brought against the corporation by its corporate name the defence set up would have been more imposing, but as the individuals executing the mortgage and some of their alledged successors are the only persons implicated in this pro-

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ceeding, they have no cause to complain. The petition moreover avers that the mortgagors were seized in fee of the mortgaged premises and on a demurrer that fact stands admitted. The act of incorporation not being shown, we cannot say what were the powers of the trustees. This case may be like that of De Zeng vs. Beekman 2 Hills Rep. 489, where by an act of the legislature, the trustees of a lot were declared to be a body corporate, and it was provided that the said trustees should have authority to sell the lot; and it was held that a deed executed by the trustees as such and not in the name of the corporation was a valid execution of the power and vested the little in the grantee.

The judgment is reversed, the other judges concurring, and the cause remanded.

THE STATE, TO THE USE OF COLLINS *et al* vs. STEPHENSON *et al.*

1. For a breach of the condition of an administration bond, suit may be brought for the use of the heirs and distributees of the estate, within less than three years from the granting of letters of administration.
2. Upon an order of the county court an administrator may be compelled to make distribution at any time after one year from the date of his letters, without any refunding bond.
3. When an administrator makes a final settlement, the power of the county court over his accounts, ceases.
4. When a court of limited jurisdiction acts without authority, no writ of error lying on its judgments, the validity of its proceedings may be questioned in a collateral action.
5. Where adult children have been reared and educated by their father during his lifetime, the minors should be instructed and supported out of his estate after his death.
6. Where older children have been educated and supported out of the estate and distribution is made before the younger ones derive any such benefit; the excess received by the older should, in making distribution, be charged against them in favor of the younger.

ERROR TO HOLT CIRCUIT COURT.

WILSON for plaintiff.

1st. The settlement of Margaret McGee is no evidence in this cause for defendants because

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her letters were vacated upon her marriage with McGee, and she had no right to make settlement thereafter with any person but the administrator, "De Bonis Non." See statutes '43, sec. 24, and therefore the court erred in giving defendants second instruction.

2d. That any person interested in the estate has a right to recover upon the bond at any time that a breach thereof occurs, a denial of which principles by the court below, caused it to refuse the five instructions asked by the plaintiff, and to volunteer one of its own assuming the ground that no suit can be maintained until three years have elapsed after the date of the letter, by any person but the administrator, "De Bonis Non," all of which is error. See State touse of Adams vs. Deupley 10 Mo. Rep. 724.

STRINGFELLOW for defendant.

1st. The record given in evidence by plaintiff shows that the administratrix had, before suit brought, made a final settlement with the county court, and that on such settlement the estate was in debt to the administratrix. This settlement is a judgment and conclusive, and shows that plaintiff had no right to recover against defendant. 9 Mo. Rep. 362, 5 Mo. R. 473, 4 M. R. 425, Rev. Code p. 56, sec. 8.

2d. Allowances made by the county court, on settlements made with an administrator, are judgments, and if not appealed from cannot be reviewed in another court unless upon a charge of fraud in their being obtained. 9 M. R. 362, 6 M. R. 501, 5 Mo. R. 473. 7 Mo. R. 471.

3d. It is submitted that suit can only be brought by the administrator de bonis non, where one has been appointed unless it be shown that the estate has been settled, or an order has been made by the court for payment. What could be the measure of the damages in this case? The plaintiff is entitled to nothing unless he show that upon settlement he would be entitled to distribution; at all events, in this case, where the evidence shows no right of the distributees which has been affected by any act of the administratrix not showing any injury to plaintiff.

4th. Should there be error in this position, still the plaintiff cannot complain, it being manifest upon the record, the plaintiff has shown himself not entitled to recover. 9 Mo. R. 305.

5th. The final settlement made by the late administratrix after her marriage and appointment of administrator de bonis non, is legal, and had to be made, although her letters were vacated. Rev. Code p. 44, sec. 34.

ISAAC JONES, on the same side insists :

1st. That the declaration is insufficient in law.

2d. That the court below ought to have rendered a judgment against the plaintiff on the demurrer of said plaintiff to defendants pleas.

3d. That there is not such a joint interest in the persons for whose use this suit is brought as to entitle them to sustain this suit in their joint names.

4th. That by dismissing this suit as to some of the plaintiffs; it thereby discontinued the whole suit.

5th. That this suit cannot be brought until an order of distribution has been made, or until three years elapsed from the granting of the letters of administration to the administratrix.

6th. That the evidence introduced by the plaintiff shows that the administratrix before the commencement of this suit had made a final settlement with the county court, and that upon that settlement the estate was indebted to her, the judgment therefore being according to the

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rights and justice of the case, the court will not disturb it, even although the court below may have committed a technical error,

7th. That this suit is brought against the administratrix in her representative capacity, and against the others in their individual capacity, and for this reason the declaration is bad.

8th. That there is a variance between the declaration and the bond sued on in this, that the declaration describes the bond as having been made payable to the plaintiff, to and for the use of the persons for whose use this suit is brought, when in truth it is payable to the State only.

9th. That neither the declaration or proof shows any liability on the part of defendants to the persons for whose use this suit is brought.

SCOTT, judge, delivered the opinion of the court.

This was an action of debt against Margaret Stephenson as the administratrix of her deceased husband, Wm. Stephenson, and her sureties on her official bond, brought to the use of the heirs and distributees of the said Wm. Stephenson. The suit was instituted on the 2d October, 1846. The bond was dated the 7th February, 1842, and was conditioned to administer faithfully and account for and pay over all money and property of the said estate, and perform all other things touching said administration, required by law, or the order of any court possessing jurisdiction of the matter. Breaches were assigned on all the conditions, and issue being joined, the parties went to trial. The pleadings will not be noticed, as the points in the cause arose upon the evidence, and the instructions given and refused. Orders were made discountenancing the suit as to some of the parties for whose use the suit was brought.

Pending her administration Margaret Stephenson intermarried with Zachariah McGee. Upon this the court appointed Peter Stephenson administrator, de bonis non, of the estate of Wm. Stephenson at the March term thereof, 1845, and made an order that the administratrix pay over to him all the effects in her hands. Afterwards on the 7th April, the administratrix filed what is called a supplemental report to her final settlement which consisted of a small credit which she claimed, and notified the court that she declined a compliance with its order, requiring her to deliver the effects of her deceased husband in her hands to the administrator, de bonis non, on the ground that she had been appointed guardian of her infant children. Afterwards on the 5th May, Margaret McGee, late administratrix, appeared in court and claimed an account, of which the following is a copy :

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The estate of Wm. Stephenson deceased, to Margaret McGee, as administratrix of said estate, debtor:

To clothing, boarding and schooling six minor children of the

deceased three and a half years, - - - - - \$700 00

Do. for keeping one insane girl for three and a half years, at \$200 per year. 700.00

May 5th, 1845. \$1400.00

Twelve hundred dollars of the above account was allowed. This allowance brought the estate in debt to Mrs. McGee in the sum of \$4.81.

Among other instructions asked by the plaintiff and refused were the following:

"That any allowance on settlement made by the county court unless authorized by law, does not affect the right of recovery of said plaintiff."

"That the county court had no right to allow the \$1200, or any other sum out of the interest of the estate of the heirs suing, for the support of other minor heirs, they being entitled to an equal part of the estate of said deceased, and if it was an allowance, the administratrix is responsible in this suit, at least for the share of those suing."

Among others, the court gave the following instructions:

That the record of the county court showing a final settlement of the estate of Wm. Stephenson deceased by Margaret Stephenson in the name of Margaret McGee, is prima facia evidence that the said estate is indebted to her in the sum of \$4 81; and unless this is rebutted by the evidence of the plaintiffs, they will find for the defendants.

That if within less than three years from the date of the grant of letters of administration to the defendant Margaret Stephenson, she intermarried with one McGee, and that one Peter Stephenson was appointed administrator, de bonis non, as her successor, the jury will find for the defendants.

Exceptions being saved to these opinions, the plaintiffs submitted to a non-suit, and after an unsuccessful motion to set it aside, sued out this writ of error.

In the case of the State to the use of Adams and other vs. Campbell, Dudley and al. 10 Mo. Rep. 724, the court held that for a breach of the conditions of an administration bond, suit might be brought for the use of the heirs and distributees of the estate within less than three

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years from the granting of letters of administration. In the opinion in the case the measure of damages in such suits is not stated they being ascertained from the circumstances. The idea of the instruction is founded on the notion that all estates are embarrassed. Cases may occur in which such a suit would be useless, but others may be imagined in which it would be necessary. The condition of the estates of deceased persons are very different. Some may be settled and distributed at once, there being no debts, while the administration of others is attended with difficulties and delay. The proceeding by attachment to compel settlements may prove unavailing. The administrator may be insolvent and there will be no security for the costs unless suit be brought on the bond. The statute moreover expressly gives a suit on the bond for a failure to make settlements, as a concurrent remedy with the process of attachment. Section 7, article 5 of the administration law.

It is a mistake to suppose that an administrator cannot be compelled to make distribution within three years from the date of his letters without a refunding bond from the distributees. Upon an order of the county court he may be compelled to make distribution at any time after one year from his assuming the burden of administration, without any refunding bond, sec. 1, 2, art. 6. of the administration law.

The instruction of the court, allowing the weight of *prima facie* evidence to the settlement of the last account of the administratrix was erroneous. Without adverting particularly to the manner in which that account was made out and to the time and circumstances under which it was presented, which we think should have insured its rejection, it may be remarked, that there was a want of authority in the court to entertain jurisdiction of the matter at the time of its presentation. The administratrix had made a final settlement, and with that act ceased the power of the court over her accounts. If she could at one term after final settlement come in, present accounts, and overhaul her administration, she could at any time thereafter, and thus there would be no safety for estates against the claims of administrators. If there was a mistake or omission in her accounts, she might have filed her bill in equity for relief. The principle of the case of *Caldwell vs Lockridge*, 9 Mo. Rep. 362 is applicable here. After a final settlement the administratrix was no longer such. Her powers had ceased by her marriage and the appointment of an administrator, *de bonis non*, she could no longer be in court for any purpose. She would be as any other person coming in and asking for a settlement. The action of the court in en-

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tertaining such proceedings was *coram non judice* and void; and the case above cited recognizes the principle that when a court of limited jurisdiction acts without authority, no writ of error lying on its judgments, the validity of its proceedings may be questioned in a collateral action.

The instruction which asserted the law to be that an allowance made for the support of minor children should be charged to them as a portion of their distributive share of the estate; was properly rejected. Where there are adult and minor children, the adults having been reared and educated at the expense of the parent during his lifetime, it is nothing but justice, that the minors should be instructed and supported out of his estate after his death. By this means, all the children will be placed on an equal footing. The inequality in the ages of the minors may produce some difficulty in apportioning the sums allowed by the court. Some may be of age to receive instruction, and others may be of too tender years for that purpose, and the estate may be distributed before they are of a sufficient age; under such circumstances it would be unjust to educate and support the older children at the expense of the younger ones. In such cases the excess allowed the older children over that allowed the younger, might, in making distribution, be charged against the older in favor of the younger.

We do not consider that the orders discontinuing the suit as to some of those for whose use the suit was brought had the effect of a discontinuance as to all. The State of Missouri' was the plaintiff in the action. A discontinuance as to some showed they claimed no damages, and they would be overlooked in assessing them; and if their names had been improperly used, the question of costs would be subject to the control of the court, and they would be imposed on the proper parties.

The other judges concurring, the judgment will be reversed and the cause remanded.

SUPREME COURT,

OCTOBER TERM, 1848.

CABUNNE vs. LINDELL.

1. The notice of location to the Surveyor General when the land had been surveyed and the location and plat of survey when a survey was necessary, is sufficient to support an action of ejectment under our statute allowing such actions on New Madrid locations.
2. The statute of limitations does not commence to run against a New Madrid claimant, until the plat and survey of the land located have been returned to the recorder of land titles. This return consummates the claimant's title.
3. If a location and survey of land have been made within the time required by the act of Congress of April 1822; a failure on the part of the Surveyor General to make a return to the recorder will not render the location and survey void; though it might delay an appropriation of the land.

APPEAL FROM ST. LOUIS CIRCUIT COURT.

POLK for appellant.

By the statute law of Missouri, the action of ejectment could be maintained on a *New Madrid location*.

Now the return of the survey and plat of the tract of land surveyed for Jos. Hunot or his legal representatives to the recorder of land titles, is either the "location" of this particular New Madrid claim, or it is not. If it is, the plaintiff could not recover by virtue of it, because by the act of Congress of 26th April 1822, no such location could be made after the 26th of April 1823. And this "location" being made after the last named date, it was unauthorized and consequently void.

If it is not, but if on the contrary the certificate No. 161, the notice of entry of date of 16th June 1818, and the survey No. 2500 of date of June 23 1819, either altogether, or any one of them singly, constitute the "location" then the plaintiff might have maintained his action of ejectment for the premises sued for in this action, ever since, at least, the 23d of June 1819, and ever since that time the deft. could hold the premises *adversely* to the plaintiff and those under whom he claimed, and consequently ever since that time, the statute of limitations could run against the plaintiff's claim. And it is no answer to the position, that the statute of limitations could run against the plaintiff's claim prior to the 8th January 1833,

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to say that plaintiff and those under whom he claimed had only an *equity* in the land up to that time, and that the *legal title* was in the United States, because that was true as well after the 8th of January 1833, as before. If this position be not true, the statute of limitations could never run until the legal title had passed out of the United States by patent or otherwise.

2d. But the case of *Bagnell vs. Broderick* (13 Peters 436) was relied on in the court below and doubtless will be relied on in this court, as showing that the return of the survey to the recorder of land titles was the first appropriation of the land to the claimant and that consequently the statute of limitations could not begin to run until after that time.

To this we answer, that the case of *Bagnell vs. Broderick* goes further, and expressly decides, if it decides any thing, "that the location referred to in the act of our General Assembly which defines and enumerates the different kinds of titles upon which ejectment may be maintained, is the plat and certificate of survey returned to the recorder of land titles." But in this case such return was not made until the 8th January 1833 and of course by the authority of the case of *Bagnell vs. Broderick* there was not the "location" referred to by our statute until the 8th of January 1833. Now by the act of Congress of 26th April 1822 as already stated (3 Story's Laws U. S. 1841) it is enacted "that all warrants issued under the act for relief of the sufferers by earthquakes shall be located within one year after the passage of the act, that is before the 26th April 1823, in default whereof the same shall be null and void." By this act of Congress therefore there could be no location of the warrant No. 161 in this case, after the 26th of April 1823, and of course the "location" in this case, which was not made until the 8th of January 1833, in the language of the act of Congress must be "null and void" and if so, the plaintiff of course was not entitled to recover upon it.

3d. But it was heard for the first time in this state upon the decision of the case of *Bagnell vs. Broderick* (13 Peters 436) as far as I have been able to learn, that the return of the plat and certificate of survey to the recorder of land titles alone constitutes the New Madrid location which by our statute is made sufficient to maintain an action of ejectment. On the contrary in the administration of this law by our state courts, all of them even to that of highest authority and last resort, I believe it has been universally considered that when the lands selected by the New Madrid claimant under the warrant issued to him by the recorder of land titles, had been duly surveyed for him, the New Madrid location contemplated by the statute of Missouri was perfected, and legal evidence going to such a length has been considered proof a New Madrid location upon which a recovery in ejectment might be had. and if proof to this extent does not establish a New Madrid location under our act of Assembly, why then there have been scores of recoveries in ejectment in the courts of this state and not a few perhaps even in this court, upon New Madrid locations when in point of law no New Madrid location has been shown.

And even in this very cause the plaintiff closed his case in the court below in the first instance without ever offering any evidence of the return of the survey and plat to the recorder of land titles. That is in the opinion of his counsel he had made full proof of the New Madrid location contemplated by our statute, without offering any evidence of the return of the survey and plat to the recorder of land titles.

4th. Again, the instruction given by the court below is based upon the hypothesis, that the statute of limitations cannot begin to run against the plaintiff except from the time at which he was first enabled to bring an action of ejectment. But that is not the language of our act of limitations. It does not say that hereafter no person shall bring an action of ejectment for lands &c., after the expiration of 20 years next after his right to bring an action of ejectment first accrued; but no person shall make entry into lands &c., after the expiration of 20 years next after his right or title to the same first accrued. See Ter. Laws vol 1 p 598.

Now it is contended on the part of the appellant that,

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1st. The statute of limitations in this case commenced to run against the appellee from the moment his right of entry first accrued, and,

2d. That his right of entry accrued against this defendant and against all the world except perhaps the U. S. before the 8th January 1833. That it commenced to run on the 23d June 1819, when the land covered by the New Madrid location was surveyed and set apart for the New Madrid location and his legal representatives.

That from and after that date he had such a right of entry as is contemplated by our statute of limitations and against which an adverse possession of 20 years would constitute a bar to recovery. It is clear to my mind that it is the right of *entry* against which the statute provides the bar, and not the right to maintain ejectment, and that a right of *entry* existed in the appellee from and after the 23d June 1819.

GAMBLE for appellee.

The plaintiff asked and the court gave the following instruction:

That if the jury find from the evidence that the return of the survey of the tract of land located for Joseph Hunot or his legal representatives was made by the Surveyor General to the recorder of land titles on the 8th day of January 1833, the possession of the land in dispute by the defendant and those under whom he entered into possession is no bar to the plaintiff's recovery.

No instruction was asked by the defendant.

There can arise no other point in this case than whether the instruction given was correct and upon that, the decision in 13 Peters, of Bagnell vs. Broderick is conclusive.

SCOTT, judge, delivered the opinion of the court.

This was an action of ejectment commenced on the 4th of March 1842 in the St. Louis circuit court by Lindell against Cabunne for a tract of land lying in the county of St. Louis.

Lindell claimed under a New Madrid certificate granted by the recorder of land titles to Joseph Hunot or his legal representatives dated 12th August 1816. Evidence was also given of a notice of entry by Jos. C. Brown for Rufus Easton. Rufus Easton as the legal representative of Jos. Hunot, entered 480 acres of land by virtue of the above certificate No. 161 describing the land entered. Evidence was then given of the survey of the said entry dated 23d June 1819, afterwards a conveyance was read showing Lindell to be the representative of Hunot. The possession of the premises in controversy by the defendant was proved.

After the rejection of some evidence of a paper title, offered by the defendant, testimony was given tending to show an uninterrupted adverse possession in him for more than twenty years prior to the commencement of this suit.

The plaintiff then showed, that the survey of the location made by

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Easton was not returned to the recorder of land titles until the 8th January 1833.

The court at the instance of the plaintiff gave the following instruction: That if the jury find from the evidence that the return of the survey of the tract of land located for Jos. Hunot or his legal representatives, was made by the Surveyor General to the recorder of land titles on the 8th January 1833, then the possession of the land in dispute by the defendant and those under whom he entered into possession is no bar to the plaintiff's recovery. This instruction was excepted to—verdict and judgment for the plaintiff.

When this case was opened a difficulty presented itself as to the propriety of allowing the statute of limitation as a defence, in cases when the fee of the land in dispute had not passed from the government. In the case of Johnston vs. Irwin 3 Ser. & R. 292 a doubt was expressed how far the statute of limitation operates as to private persons, when the legal estate remains in the commonwealth, and the court considering it a question of great importance declined giving an opinion in relation to it, afterwards however in the case of McKoy vs. the Trustees of Dickinson College 4 Ser. & R. 302 it was held that a title by warrant and survey without a patent is within the act of limitations and is barred by an adverse possession of sufficient duration. So in the case of King et al vs. Martin 5 Martin's Lon. Rep. U. S. 197, it was held that settlers coming within the purview of the act of Congress of the 2d March 1805 for ascertaining and adjusting the titles and claims to land within the territory of Orleans and district of Louisiana, may prescribe from the day that they were embraced by the dispositions of that law. These authorities will warrant us in entering upon the investigation of the question here involved, without any expression of opinion as to the effect of a patent in such cases, issued after twenty years from the beginning of an inchoate title. Duke vs. Thompson et al 16 Ohio Rep. 34.

The doctrine of the cases of Bagnell et al vs. Broderick 13 Pet. 450, and Barry vs. Gamble 3 How 51, that until the plat and survey of the land located are returned to the recorder's office, the land selected is not appropriated to the use of the New Madrid claimant, has been relied on by Lindell in support of the judgment of the court below. On the other hand it is said, that the law of those cases is in diametrical opposition to the views which have always prevailed in this state and that the location and survey have always been regarded as sufficient evidence to maintain an ejectment. I am not aware that under the law

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for the relief of sufferers by earthquakes in New Madrid the question as to the time when the land becomes appropriated to the claimant has ever been discussed in our courts. The notice of location to the Surveyor General when the land had been surveyed and the location and plat of survey when a survey was necessary, have always been regarded as sufficient to support an ejectment under our statute allowing such actions on New Madrid locations. Nor has the question been made, when the statute of limitations commenced running against a New Madrid claimant, whether from the date of the survey or from the date of the return to the recorder's office, admitting that by the law of this state the survey was evidence sufficient to maintain an ejectment, yet if by the laws of the United States a party has no title to the land, if it has not been appropriated to his use, could the state impose on him the necessity of bringing suit within a given time under the penalty of losing his land? The strong probability that the land selected would ultimately become the claimants, might well warrant the legislature in giving him an action of ejectment. There is nothing in the nature of our political institutions, which prohibits the states from passing laws enabling those who have taken incipient steps to obtain a title to lands from the United States, to protect that land from the depredation of trespasses, although such steps may not be regarded by the general government as conferring a title, such legislation, so restricted as not to interfere with the primary disposition of the soil by the United States is in conflict with no provision of the federal constitution and is a necessary attribute of sovereignty in the states to enable them to protect the rights of all those within their jurisdiction. The remedy offered by the state, the claimant might use or not at his pleasure, but as he claimed under the laws of the United States, and looked to them for the inception and consummation of his grant, he could not be compelled by state legislation to bring suit before there was an actual appropriation of the land for his use in pursuance of the laws of the United States. This view of the matter reconciles the construction given to our statute regulating the action of ejectment with the interpretation of the act for the relief of the sufferers in New Madrid by those courts whose province it is to expound it and to whose opinions we are compelled to conform.

It was said, that the question as to the time when the land first became appropriated to the use of the claimant did not arise in the case of *Bagnel vs. Broderick*. It is true that the cause might have been

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determined without an expression of opinion in relation to this question. But upon examination it will be found that the point was involved and that it was determined. As this is a question arising under the laws of the United States and as the highest tribunal known to the federal constitution has pronounced its judgment in relation to it, that judgment is obligatory on this court whatever opinion might be entertained of its correctness.

I am not impressed with the force of the argument drawn from the act of the 26th April 1822 to perfect certain locations and sales of public lands in Missouri. The second section of the act provides, that hereafter the holders and locators of N. Madrid warrants shall be bound in locating them to conform to the sectional and quarter sectional lines of the public surveys, as nearly as the respective quantities of the warrants will admit and all such warrants shall be located within one year after the passage of this act, in default whereof, the same shall be null and void. It was contended that as the return of the plat and survey to the recorder constitute the location, and as the return in this case was not made until years after the appointed time, the location is therefore null and void. The court in the case of Bagnell vs. Broderick did not intend to define what is a location, but what constituted an appropriation of the land by the claimant. They hold that all the requirements of the act of 1815 must be complied with to make an appropriation. That although the claimant may select and have the lands surveyed, that will not constitute an appropriation without a return of the plat and survey to the recorder. It is obvious, that from the words of the section above cited, that it was only designed to hasten the action of the claimants in selecting and having their lands surveyed, and could never have been intended to affect them injuriously, for the neglect of officers over whom they had no control. If their lands had been located and surveyed within the time required by the act, it could not be contended, that a failure in the officer afterwards to make a return would render the location and survey void, though it might delay an appropriation of the land. Judge McBride concurring, the judgment will be affirmed.

NAPTON, judge, dissenting.

The question in this case is simply what is a *New Madrid location*, within the meaning of the act of our legislature regulating the action of ejectment. That act declares that an action of ejectment may be

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maintained on a New Madrid location. The legislature has not compelled any man to sue for the possession of his land, no matter by what title he may claim it, but they have provided that if he fails to do so for a specified length of time, whilst it is in the adverse possession of another, his action shall in that event be barred, an adverse possession will commence running against a title whenever it is of such a character that an action of ejectment may be maintained upon it.

I take it to be beyond all question that the legislature of this State have the power to declare what incipient title, emanating from the federal government, shall authorize an action of ejectment. They may authorize an action to be maintained upon a mere survey, or upon a pre-emption right, and they have accordingly done so. They have also authorized this action to be maintained upon a New Madrid location, and whether this location was understood to mean the first, second, third or final step taken in the procurement of title, is a question for the courts of this state to determine.

That the question has been practically settled in the courts of this State for twenty years and upwards, is conceded. That no difference of opinion has been entertained either in the courts or at the bar, or among those of our citizens who have been concerned in these titles, in relation to the meaning of a New Madrid location, is beyond all controversy. There is just as little doubt in my opinion, that the congress which passed the act of Feb. 17, 1815, and their successors in passing subsequent enactments on the same subject, understood a New Madrid location in the same sense in which it has been received and acted upon in this State. Let us look for a moment at these acts.

The second section of the act of 1815 provides that the recorder of land titles shall issue a certificate to the claimant of the injured land in New Madrid. "Upon such certificate being issued, and *the location made*, on the application of the claimants, by the principal deputy surveyor," the surveyor is directed to "cause a survey *thereof* to be made, and to return a plat of each *location made* to the recorder, together with a notice in writing, designating the tract or tracts *thus located* and the name of the claimant."

This plat and notice the recorder is directed to record in his office. Can language be more explicit than this? The *location* is the first step in the title, *that location* the surveyor is directed to survey, and of that survey he is directed to make a plat. He is then directed to return to the recorder's office the plat of the location made, and the notice in writing which designates the tract *thus located*. Here the location is

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spoken of in terms as an act which had already been done, the evidences of which were directed to be filed in the proper office so that they could be communicated through the proper channel to the heads of the land department at Washington.

But the act of April, 1822, is an interpretation by congress of the meaning of a location which cannot be misunderstood. That act was partly for the purpose of giving validity to locations supposed to be defective or illegal, but it also made provision for subsequent locations, and declared that locators of warrants issued under the act of 1815, should thereafter in locating them, conform as near as practicable to the lines of the public survey, and further declared, that all such warrants should be located within one year after the passage of that act, in default whereof they were declared null and void. Now if the location was the act of the surveyor in making his return to the recorder, or the act of the recorder in filing this return, it follows that congress were compelling the locators to do an act, over which they had no control, utterly out of their power, under the penalty of losing their titles! And what a commentary do the facts of the present case present upon such a construction of this law. Here the location, or the entry was made in 1818, and the surveyor general neglected to make any return of the plat of survey and the notice of location, until 1833. A lapse of more than fourteen years occurred during which the locator had no control whatever over the proceedings in the surveyor's office, or in the recorder's office. In short, if the location consisted of the return of it into the recorder's office, it was a mere nullity so far as this law is concerned. But it is obvious that congress designed no such rank injustice; that they understood a location to be the act of the locator, and not a matter depending upon the amount of business in the offices of the surveyor or recorder of land titles.

The fact that a location might be improperly made, that it might be placed upon salt springs, or lead mines, or any other reserved land, does not prove that a valid and legal location was not an appropriation of the land. In all locations, as well as in all other forms of entering or purchasing public lands. Congress has provided for various subsequent steps to be taken in the offices connected with or subordinate to the general land department. During the progress of these steps and previous to the emanation of the patent, an illegal incipient title may be arrested, but where the incipient title is not arrested, but is followed by the other steps necessary to perfect the title, the question as to the time when the title commences is not affected by this reservation of power

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by congress. Our statute authorizes an action of ejectment to be maintained upon an entry with the register and receiver, and the receiver's receipt is all the evidence which the purchaser gets until the emanation of the patent, and upon this evidence our courts have uniformly acted.

But there are various subsequent proceedings, both in the land offices here and in the general land office at Washington, during which this title may be examined, and if the facts warrant, may be canceled. This reserved power does not however affect the general proposition that the purchaser's title commences with his entry.

It is said that the only evidence of location acted on by the commissioner of the general land office, is the plat of survey and notice returned by the surveyor. This is undoubtedly true, and the act itself makes this provision. The office of recorder of land titles is the office through which information is conveyed to the general land office. The recorder transmits his report of locations to that office, and the surveyor is required to make his report to the recorder. The commissioner of the land office acts upon the report of the recorder of land titles, and the recorder of land titles acts upon the report of the surveyor. This is the routine by which the heads of the land department at Washington are advised of the various grades of title and the action of the subordinate officers upon them. But a title is one thing, and the evidence of that title another. We are speaking now of equitable titles, which originate without deed and without patent. How does this fact, that the commissioner of the general land office acts only upon the return made by the surveyor to the recorder's office, in issuing or withholding a patent, affect the question as to the *time* of the location? The same routine or a similar one is followed in the case of an ordinary entry. The general principle is that where there are several acts necessary to pass an estate the original act is preferred and the subsequent acts have relation to this. Why should the plat of survey and notice returned to the recorder be selected as the act appropriating land, in preference to any other intermediate step in consummating the title. Why not take the survey which is a precedent act, or the patent certificate which is a subsequent one, all these acts, the location, the survey, the return of that survey and location to the recorder, the return of the recorder to the general land office, the patent certificate issued by the recorder and the return of that certificate to the general land office, are necessary to perfect the title.

It is said, however, that the supreme court of the United States in

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the case of Bagnell vs. Broderick, (13 Peters 447) have settled this question. I do not think so. That was a contest between the holders of the legal and equitable title. There was but one title. The location was made in the name of By-ne, and the return of the plat and location was in the name of John Robertson. The sole question was, whether those holding under Byrne could recover against the owner of the patent. This question was discussed by the court in two aspects, and it was the opinion of the court that the legal title must prevail, although the location had been in the name of Byrne, and further that although the location was made by Byrne, yet that the return of the surveyor of the plat of survey and notice having been in the name of Robertson, that return constituted the first appropriation of the lands.

It seems to have been the opinion of the court that the return of the plat of survey and location constituted a higher order of title than the location itself, because it was the evidence upon which the department at Washington acted, and consequently in a contest between the location and the return, the latter must prevail. It must be admitted also that in deciding this point, which however was not essential to the case, there are intimations from the learned judge who delivered the opinion, that the return of the location to the recorder's office constituted the location itself; in other words, was the first step in the title. On this point I have already given my views. I should very reluctantly venture an opinion which differed from the deliberate judgment of the supreme court of the United States, but I am not prepared to believe that that court would hold, under our statute of limitation, that an adverse possession will not run against a New Madrid location, until the return of that location has been made into the recorder's office. However this may be, I am called upon to construe a law of this State, which says that an action of ejectment may be maintained upon a New Madrid location. I am called upon to say what our legislature intended by this New Madrid location, and as I cannot doubt their intention and meaning, I am governed by their action and not by the decision of any other court, whose province does not embrace the power of giving an authoritative construction to laws of this State.

I am in favor of reversing the judgment.

PRATTE & CABANNE.

In the matter of PRATTE & CABANNE.

1. If the court gives irrelevant or erroneous instructions, and the verdict of the jury, is against the instructions, but in accordance with the law applicable to the facts of the case, a new trial should not be awarded.

PETITION FOR MANDAMUS ON THE JUDGE OF THE COURT OF COMMON PLEAS WITHIN AND FOR THE COUNTY OF ST. LOUIS.

SCOTT, judge, delivered the opinion of the court.

Jno. H. Corl sued Pratte & Cabanne on an account for liquors alleged to have been furnished them by him. Pratte & Cabanne wanting the liquors for a customer applied to Robert W. Taylor a merchant to purchase them. Taylor not having all the kinds wanted, Cabanne who made the contract, was referred to the house of Corl who supplied them. The liquors were sent to Pratte & Cabanne. A few days afterwards Corl applied to Pratte & Cabanne for payment of the bill and presented an account for the liquors made out in Corl's own handwriting in which Taylor was charged with them. Payment was refused on the ground that Taylor was indebted to Pratte & Cabanne. Corl went off and the matter was not heard of again by Pratte & Cabanne until a considerable time afterwards when Taylor had left St. Louis. Witnesses were examined whose testimony conduced to show that the credit was given by Corl to Pratte & Cabanne, and evidence going to show that it was given to Taylor was produced by the defendants. The only question in the case was whether the credit was given by Corl to Pratte & Cabanne or to Taylor. The court instructed the jury as follows on the last trial at the instance of Corl, viz:

“The defendants cannot set up, either in bar, or in mitigation of damages that R. W. Taylor or Sinclair Taylor & Co., or any person other than the plaintiff was indebted to the defendant, there being no set-off, filed. The jury will therefore disregard all evidence tending to show such indebtedness of the Taylors.

“It is not necessary that the defendants should have been notified at the time of the sale that the brandy and alcohol belonged to the plaintiff. If said brandy and alcohol did actually belong to plaintiff he can assert his right to recover for it, and his having made out a bill for it and presented it to defendants in the name of R. W. Taylor & Co. does not prevent his suing in his own name.

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"If the jury believe from the evidence, that the alcohol and brandy mentioned in plaintiff's bill when sold and delivered were the property of plaintiff, and that the same were delivered and sold to defendants, they must find for plaintiff, and assess the damages at the price and value of the said brandy and alcohol."

There was a verdict for the defendants which the court on motion set aside. There having been a previous verdict for the defendants they moved to vacate the order for a new trial for that reason, which motion the court overruled on the ground the verdict was against law. On the first trial the plaintiff asked the following instruction:

"If the jury believe from the evidence that the alcohol and brandy mentioned in the bill were at and before their sale the property of the plaintiff, and that the same were sold and delivered to the defendants, they must find for the plaintiff," which the court refused but gave the following: "If the jury believe from the evidence that the alcohol and brandy mentioned in the bill were at and before their sale to the defendants, the property of the plaintiff, and that the same were sold and delivered *as the property of plaintiff* to the defendants, they must find for the plaintiff," and also as follows: "If the jury believe from the evidence that the articles, the price of which is sued for here, were the property of Taylor or *were delivered as the property of Taylor*, they will find for the defendants."

The foregoing contains the substance of the ground on which the application for a mandamus was based as appears by the return of the judge.

There is nothing in the case of Hill vs. Deaver 7 Mo. R. which sustains the action of the court below. That case holds that a misconception or a disregard of the instructions of the court is the error in matter of law contemplated by the provision respecting new trials. Of course, the opinion of the court is to be understood, that the instructions should be applicable to the case and contain a correct exposition of the law arising upon the facts of it. If a judge gives irrelevant or erroneous instructions, and the verdict is in accordance with the real law of the case but against the instructions, on what ground is he warranted in awarding a new trial? If by giving improper instructions, he can possess himself of the power of awarding a new trial, then the Statute is a dead letter. The evidence of the weight and credit of which the jury were the proper judges clearly sustain the verdict, and as they are in accordance with the law of the case it is

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useless to examine the instructions. The only question in the case was, to whom was the credit given.

The mandamus must be awarded, judge McBride concurring.

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CAMDEN.**

1. Where particular knowledge of a fact is sought to be brought home to a party, evidence of the general reputation and belief of the existence of that fact among his neighbors, is admissible to the jury as tending to show that he also had knowledge as well as they.
2. An actual and real party to a suit, whether named on the record as such or not, cannot be compelled to testify against himself.
3. By the bankrupt law of 1841, the assignee is *substituted* to all the rights of the bankrupt.
4. To entitle a defendant to the benefit of the statute of limitations, he must either plead it or give notice under the general issue that he intends to rely upon it.
5. If a bankrupt on the eve of his bankruptcy fraudulently deliver goods to one of his creditors, the assignee may disaffirm the contract and recover the value of the goods in *trotter*; but if he brings assumpsit he affirms the contract, and then the creditor may set-off his debt.

APPEAL FROM ST. LOUIS CIRCUIT COURT.**GAMBLE & BATES for appellant.**

1st. The legal title to the choses of the bankrupt passed to the assignee, by operation of the bankrupt act (sec. 3,) see 10 Mo. R. 57. and the same law continuing their assignable quality, by authorizing the assignee to sell them (sec. 9.) The same title that he gets by the decree in bankruptcy and by his own appointment, he transfers by the sale,

The common law rule that things in action are not assignable, applies as well to the transfer to the assignee as *from him*, and so if one assignment is merely equitable, so also is the other. And therefore the suit should have been brought in the name of Camden, the last purchaser, or Anderson, the first one. 5 Mo. R. 198.

But the bankrupt law governs the whole estate, and the common law rule does not apply to it.

This question could not arise under the English bankrupt laws, for none of them, I believe,

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authorize the assignee to sell the choses. He must collect and administer the fund himself.

2d. The transfer of the goods by Anderson to Reilly, was by express contract, and in part payment of Anderson's debt to Benoist and Hackney. It was a sale and transfer of the goods to Reilly, for the consideration of a credit on the owner's debt to Benoist and Hackney. Neither Benoist nor B. & H. ever got the goods, they only undertook to pay for goods gotten by Reilly, and so there is no general *implied* promise to pay for them, but only the special agreement proved and that agreement was fulfilled at the time. A promise to pay would have been void by the statute of fraud.

3d. But if it must be considered as a sale to Benoist, it is abundantly proved that it was Benoist and Hackney, and not Benoist alone. By the express and only agreement the goods were to be furnished to Reilly and paid for by a credit on B. & H.'s account, which was done at the time.

4th. The court below was wrong in instructing for a recovery, on the assumed ground that the sale of the goods was in fraud of the bankrupt law.

That assumption is against the state and character of the action. On that assumption the assignee should have disaffirmed the sale, and sued for the goods. He cannot declare the sale fraudulent and void and yet sue for the stipulated price of the goods as on a valid sale. If he affirm the sale, then it stands with all its legal concomitants, and 1st it was a sale to Reilly and Benoist and Hackney only *oral* guarantors. 2d. The price is paid according to the terms of the express contract. 3d. There is an overwhelming set-off. In support of this point Mr. Whittlesey has cited a multitude of cases. I refer to but two or three of them. 4 T.R. 211; Smith vs. Hodson 8 Taun 490.

5th. The commissioner in bankruptcy is part of the legal means and machinery of the bankrupt court. He allowed and set-off the smaller account in diminution of the claim of B. & H. against the bankrupt, and this is a flat bar as to that account. If not, the bankrupt estate gets the account *twice paid*.

PRIMM & WHITTLESEY ON same side.

1st. Has the plaintiff, Darby, a right to sue? By the bankrupt act, all the property of a bankrupt is by the act of bankruptcy vested in the assignee, Bank. act sec. 3, 5, stat. U. S. 443. By sec. 9, the assignee is authorized to sell the property assigned and the choses in action. By the order of the court the assignee sells the choses in action, and Camden becomes the purchaser of the account. It is sold by authority of law in virtue of an order of court. The appellant contends that the title vested in Camden as the purchaser, and the suit should have been brought in his name. By the English law the assignees collected the choses in action of the bankrupt, by our law the assignee is authorized to sell them

2d. Could the defendant below set up the statute of limitations as a bar? By the act of 1847 p. 108 sec. 5, parties are allowed under the general issue to set up any matter of defence without regard to the nature of the action. This act was in effect at the time of trial, and as a consequence the defendant could avail himself of any defence he might have, under the general issue. A law applies to every thing in existence at the time it takes effect, unless specially excepted.

3d. The plaintiff having brought an action of assumpsit for the goods sold, is barred from denying the contract made with Anderson for the bankrupt by the defendant, and having sued for the price of the goods, the defendant is entitled to show that they have been paid for and to show a set off equal to or greater than the plaintiff's demand. See Smith vs. Hodson 4 Tenn. R. 211; 2 Smith L. Cases 81 and notes; Rose vs. Hart 8 Taunt 944; 2 Smith's L. C. 172 and notes. The case of Smith vs. Hodson is almost precisely parallel with this, and its

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principle, that a party cannot blow hot and cold, affirm part of a contract and deny another part is asserted in many cases. The plaintiffs having asserted and set up a contract, cannot afterwards allege against the plea and defence of payment and set off, that the transaction was in fraud of the bankrupt law and intended to secure a fraudulent preference. In *Smith vs. Hodson* it was stated that the agreement was in fraud of creditors and yet the court say the assignee cannot blow "hot and cold" as they have treated it as a contract of sale, they must pursue it through all its consequences, all of which is that the party may set up the same defence he might have used against the party himself. See the opinion of Lord Kenyon. See *Wilson vs. Poulter* 2 Strange 859; *Billow vs. Hyde* 1 Ath. 128, *Birch vs. Wright* 1 T. R. 373; *Thorpe vs. Thorpe* 3 B. & Ad. 580; *Brewer vs. Sparrow* 7 B. & C. 310. Set off against bankrupt assignees, see *Rese vs. Hart* 8 Taunt R. 499; *Ex parte Deese* 1 Atk 228; *Dickson vs. Cass* 1 B. & Ad. 343; *Hawkins vs. Whitten* 10 B. & C. 217; *Atkinson vs. Elliott* 7 T. R. 378; *Sheldon vs. Rothschild* 8 Taunton R. 156, *Hulme vs. Muggleton* 3 M. & Welsby 30, bankrupt act 5 Stat. at L. 445; *Greene vs. Chickering & Mackay* 10 Mo. R. 109.

4th. The transcript of the proceedings in bankruptcy offered in evidence was incomplete as appeared from the testimony of Darby, from the transcript of the proceedings of the commissioner in bankruptcy and the certificate of the clerk does not set out that it is a full and complete transcript. The transcript of a record should be full and complete. *Vance vs. Reardon* 2 Nott & McCord 299; *Ferguson vs. Harwood* 7 Cranch 408, 1 Stark Ev. 192, Bac. Ab. Ev. F. 610, 3 Ins. 173; *Rex vs. Smith* 8 B. & C. 341.

If this transcript were excluded the plaintiff could show no right to recover, and the court would have been bound to instruct the jury that the plaintiff could not recover on the case made out by him.

5th. John B. Camden was a good witness for the defendant. He was not in fact a party to the record, and his interest was adverse to the party calling him, and if that party chose to waive the objection and call him as a witness, Camden could not refuse to be sworn. This point seems so plain as hardly to require the citation of authorities.

6th. The court erred in allowing S. J. Bacon to testify as to his opinion as to Anderson's solvency or circumstances. The object of this testimony was to bring home to Benoist the defendant, notice of Anderson's insolvency. The evidence was illegal in any case, and especially in this case, for the fact of his knowledge could not affect the matter, when the assignee recognized the contract and sued upon it.

Opinion is not evidence except in the case of experts, testifying as to something peculiar to their class or profession, as physicians, lawyers, &c. Reputation is not evidence except as to matter of general notoriety or affecting a class of persons. 1 Stark Ev. 153 and cases there cited; 1 Stark Ev. 30, 33, 34.

7th. Points involved in the motion for new trial and the instructions given and refused are involved in the points already made. The court erred in allowing interest from the day of sale, and the damages were excessive.

8th. As to the sum of \$190, the price of the goods purchased by Benoist, the amount having been allowed as a credit against the estate of Anderson in the account allowed by Watson the commissioner in bankruptcy, the plaintiff is estopped from claiming it, as it had already been litigated and settled by the judgment of a court having proper jurisdiction, and its decisions final, more especially against a party claiming against the decision to which by law he was a party. Authorities are not needed to show that a judgment between parties is an estoppel against any suit or claim between the same parties. See *Vorhees vs. Bank United States* 10 Pet. R. 449; *McNair vs. Riddle* 8 Mo. 264; *Thompson vs. Tolmie* 2 Pet. R. 257.

9th. The defence of indebtedness and set off, was a good defence under the general issue, as was decided by this court in the case of *Green vs. Chickering & Mackay* 10 Mo. 109; *Carr vs. Hencliff* 4 Barn & Cress 517.

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CROCKETT & BRIGGS for appellee.

1st. That the sale from Anderson to Benoist was void under the 2d section of the bankrupt law. *Dennet vs. Mitchel C. Law Reporter* 16; *In Re Alonzo Pearce C. Law Reporter* 261; *McLean Assee &c. vs. Lafayette Bank*, Western Law Journal for Oct. '43 15; *McLean Assee vs Johnson* Western Law Journal for Jan '44 189.

2d. That the suit was properly brought in the name of Anderson assignee, notwithstanding the sale to Camden of the account sued upon. The said account not being assignable in law so as to authorize a suit in the name of Camden. See 2d and 3d sec. bankrupt act.

3d. That the statute of limitations cannot be relied upon by the plaintiff in error because he neither pleaded nor gave notice of such defence and it is not admissible under the general issue.

4th. That the interrogatory propounded to the witness Bacon by the defendant in error and objected to by the plaintiff in error, was competent for the purpose of showing the notoriety of Anderson's insolvent condition and thereby bringing home to Benoist a knowledge of that fact. *Brander vs. Ferriday* 16 Lou. R. 296; *Greenleaf's Ev.* 168 and note.

5th. That Benoist was not entitled to his set off because,

1st. The demand which he attempted to set off, was due to Benoist & Hackney and cannot be set off against Benoist's individual debt. *Chitty on Bills* 718.

2d. The sale from Anderson to Benoist being a fraud upon the bankrupt act, it would defeat the main intent of the second section of said act, to allow the set off.

6th. That the sale from Anderson to Benoist being a fraud upon the bankrupt act, and Benoist having actually sold or converted the goods to his own use, the assignee in bankruptcy was entitled to waive the tortious manner in which Benoist acquired the goods and hold him liable for their value in an action of assumpsit. *Chitty on Con.* 407; 3 *Taunton* 274; 6 *Eng. Com. L. R.* 157; 1 *Chit. Pl.* 100; 1 *Barnwell & Creson* 418; 4 *Tenn. R.* 211; 2 *Dowl. & Ry.* 568; *Buchanan vs. Findlay* 9 *B. & C.* 738; 17 *Eng. C. L. R.* 486.

7th. That the transcript of the proceedings in bankruptcy was properly admitted in evidence and if it were not, the plaintiff in error was not prejudiced thereby, as he admitted in the pleadings all the material facts established by the transcript.

8th. That the plaintiff in error in proving up his demand against the bankrupt's estate *voluntarily* endorsed a credit thereon for part of the demand sued for in this action, such endorsement is no bar to this action, as it would otherwise operate as a complete evasion of the 2d sec. of the bankrupt act.

9th. That Camden being the real plaintiff in interest and the suit appearing on the record to have been brought for his use, he could not be compelled to testify against himself, except in the mode pointed out by the statute for compelling a discovery.

10th. That Benoist & Hackney having proved their debt against the bankrupt's estate thereby waived their set off, that in this action they could not set off against the assignee, any demand for which they could not maintain an action against the bankrupt and having proved their demand against the bankrupt's estate, they could not maintain an action against the bankrupt, nor use the demand thus proved, as a set off against the demand of the assignee. See 5th sec. bankrupt act.

11th. That Benoist obtained the goods by his own wrongful act, and in such manner as to render it a fraud in law. "That he cannot avail himself of his own wrongful act to establish mutual credit." 1 *Leigh's Nisi Prius* 298.

12th. That the notice filed with defendant's plea is not a notice of set off, there being no offer in said notice to set off any claim whatever against plaintiff's demand. But it is an attempt to set up in bar a decision by Watson com'r upon plaintiff's demand. Watson's decision is and can be no bar to the claim of the \$1504, because it was in no manner before

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him, nor as to the \$227, because Darby was not present, assenting thereto, and the credit was voluntarily entered by Benoist.

McBRIDE, judge, delivered the opinion of the court.

John F. Darby, assignee in bankruptcy of John J. Anderson, who sues to the use of John B. Camden, brought his action in assumpsit in the circuit court of St. Louis county, against the defendant, Louis A. Benoist. The declaration contained the common counts for goods, wares and merchandise, sold by the bankrupt previous to his bankruptcy. The bill of particulars contains the items of the plaintiff's demand, and may be designated as account A, for \$1504 83, and account B, for \$226 64.

The defendant pleaded the general issue, with notice of special matter, under the statute then in force. The first special defence was *payment*. 2. That Anderson was declared a bankrupt; that Darby was appointed assignee and Thomas Watson was appointed commissioner in bankruptcy for St. Louis county, and that Anderson was indebted to the defendant and one Hackney in the sum of \$10,000. That the defendant appeared before the commissioner, and the plaintiff also appeared, and the defendant introduced evidence showing the indebtedness of Anderson to Benoist & Hackney in the sum of \$10,000 and at that time all the indebtedness in the bill of items was allowed as an offset and credit then due and owing from Anderson to Benoist and Hackney; all which was done, with the consent of Anderson, Darby, Hackney and the commissioner. That after allowing all the claims of Anderson, he, Anderson, was still indebted in the sum of \$10,000.

At the trial before the court sitting as a jury the plaintiff read the deposition of James P. Thompson who testified that account A was bought for Benoist by his brother-in-law, and that account B was bought by Mrs. Benoist, that he believed that at the time of the sale Benoist knew of Anderson's embarrassed condition, and that he purchased the goods to save all he could for himself, and that Benoist knew of Anderson's intention to assign, and that he intended to obtain a preference over Anderson's other creditors.

It was admitted that Darby was the assignee, duly qualified.

The plaintiff then offered the transcript of the proceedings in bankruptcy of Anderson, to which the defendant objected, because the clerk's certificate did not show that it was a full and complete transcript of all the proceedings in the case of J. H. Mudge and others in

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bankruptcy against John J. Anderson, and also of John J. Anderson in bankruptcy. The clerk's certificate reads, "the above and foregoing is a true copy of the records in my office" and the facts afterwards elicited showed that it was not a complete and full transcript. The court overruled the objection and the defendant excepted.

The petition of the creditors state that Anderson on the 11th day of May 1842 committed an act of bankruptcy by making a fraudulent assignment. The petition was filed the 20th of June 1842. On the 14th September 1842, Anderson was declared a bankrupt by the district court of the United States, and John F. Darby was appointed assignee on the 2d September 1844. The court ordered the assignee to sell all the choses in action of the bankrupt Anderson of which the claim in suit was one. The report of the assignee of the sale of the choses in action here referred to does not appear in the record of the proceedings of the district court although such report was made. The plaintiffs then introduced the bankrupt Anderson who testified that the defendant met him in the street in the spring of 1842 and asked him if he would let Mr. Reilly (Benoist's brother-in-law) have goods and credit the amount on his indebtedness to Benoist and Hackney. He agreed to the proposition. Mrs. Benoist also got goods at the same time. Mr. Reilly bought goods amounting to \$1504 83 on the 9th May 1842. This was before Anderson's assignment which was made on 11th May 1842. He owed Benoist & Co. more than \$20,000. No goods were sold on the 12th May. He supposed and thought that Benoist knew of the embarrassed condition of his affairs. He settled with him and the amount was credited upon his notes and account, and he still remains indebted to Benoist & Co. This is my receipt:

St. Louis May 11, 1842.

Received from Louis A. Benoist fifteen hundred and four dollars in full for bill of goods purchased by James M. Reilly for account of L. A. Benoist & Co. from John Anderson & Co. JOHN J. ANDERSON.

The amount we settled the day after the sale. He gave me up one or two notes and I gave him a new one for the balance. On the 10th May he consulted counsel as to the propriety of making an assignment. On the next day the assignment was made and the store closed. That prior to his assignment, and at the time thereof he was insolvent. In December or January prior thereto, he made a deed of trust to some real estate to secure the defendant in a specific debt.

The plaintiff next introduced T. J. Bacon who testified that it was his opinion that in May 1842, and for some time previous, Anderson was

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insolvent. Defendant was absent from St. Louis part of the winter and spring. His opinion of Anderson's condition was founded upon many circumstances such as his borrowing money at usurious interest drawing kiteing bills &c. Defendant was a banker and broker, and Anderson dealt extensively with him and bought many bills of him.

The plaintiff here closed his case. The defendant then asked the court to declare that upon the evidence offered by the plaintiff he was not entitled to recover, which the court refused and defendant excepted.

The defendant offered in evidence the transcript of the allowance of claims of L. A. Benoist & Co. against the estate of John J. Anderson, by Watson the commissioner in bankruptcy for St. Louis county. The commissioner allowed upon one note \$2905 50, upon another \$2890 86, upon another \$2283 23, with a credit of \$717 17, making in all the sum of \$7372 82; also the sum of \$179 31 on an account current presented by the defendant against said estate—this account contains a credit for \$227 48, the defendant's account with Anderson for goods furnished his wife, also a credit for \$38 50, the amount of Hackney's individual account. It was admitted before the commissioner, that Anderson had paid Benoist & Co. interest, at the rate of one and a half per cent. per month.

Defendant then introduced Charles Sanguinette who testified that he called upon Anderson to send in his bill to defendant for settlement; that Anderson was largely indebted to Benoist & Co.; that the goods were to be credited on Anderson's indebtedness. Benoist asked Anderson for certain goods and said that he would send Reilly to pick them out, for Mrs. Benoist. He got a memorandum from Mrs. Benoist and Reilly selected the goods. The bill A for \$226 was for Mrs. Benoist. The goods bought by Reilly, bill B, \$1504 83 were on account of Benoist & Co., a firm then composed of L. A. Benoist and Aaron H. Hackney.

Defendant next introduced Peter N. Ham who testified that he was present at the settlement of Anderson and defendant—the memorandum is in his hand-writing as follows :

Account of J. J. Anderson, Note No. 8272,	\$2884 51
Rec'd on acc't of J. Charless & Co. note \$554 58	
Bill of James M. Reilly,	1504
J. J. Anderson, note for balance,	825 93

	\$2884 51

The receipt of J. J. Anderson for \$1504 is in witness' hand-writing. The account was settled by giving up old notes and taking a new one

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for the balance. The settlement was on the 11th May 1842. B. and H. both had private accounts with A. at the date of the settlement. B. had just returned from Havannah where he had spent the winter and spring—thinks it was known to the whole community that A.'s condition was critical. It was hard to tell who was good. B. had to ask an extension.

Defendant then offered to introduce John B. Camden as a witness, when plaintiff's attorney objected, as Mr. C. was unwilling to testify, which objection the court sustained and defendant excepted.

John F. Darby was next introduced by defendant and testified that he sold the choses in action of Anderson in obedience to the order of the district court, and J. B. Camden bought the claim upon which this suit is brought; the sale was prior to the commencement of the action. Anderson was embarrassed before the institution of proceedings against him in bankruptcy; he knew it and supposes every person there knew it. About noon 11th May 1842 he called at Anderson's store and found it closed, then called at his house, when he told witness he had made an assignment.

Benoist & Co. and Geo. Collier both had to ask an extension at the time.

Defendant then closed and asked the court to instruct the jury as follows:

1st. The court instructs the jury that upon the evidence offered by the plaintiff he is not entitled to recover.

2d. The court also instructs the jury that the plaintiff having brought his action of assumpsit, it is a ratification of the indebtedness between the parties, and if the bankrupt was indebted to the defendant in a sum greater than the debt of the defendant to the bankrupt, it may be set off against the claim of the assignee.

3d. If the jury believe from the evidence that at the date of the sale of the goods by the bankrupt Anderson to the defendant, that Anderson was indebted to the defendant in a sum greater than the amount claimed in this suit, they will find for the defendant.

4th. The defendant also moves the court to exclude the transcript of the proceedings in bankruptcy in the matters of Anderson as the same is not a full and complete record of all proceedings in said case.

5th. The district court in bankruptcy having ordered the sale of the choses in action belonging to the bankrupt Anderson, if the account sued upon was one of the choses ordered to be sold, then the action is wrongfully brought by Darby and the plaintiff is not entitled to recover.

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6th. If the debt sued for was contracted more than two years before the bringing of this suit, the plaintiff is barred by the statute of limitations and cannot recover.

7th. If the sum of \$227 48, part of the account sued for, was allowed as a credit before the commissioner in bankruptcy, the plaintiff in this suit is barred from claiming that amount.

All of which the court refused, and the defendant excepted.

The plaintiff then asked the following instruction :

1st. The plaintiff moves the court to declare the law to be and so to decide, that if the defendant or the firm of which he was a member, purchased goods of John J. Anderson before his bankruptcy, with a knowledge that the said Anderson was insolvent and with a view to obtain a preference over the other creditors of said Anderson, and if said Anderson sold the said goods, knowing that he was then insolvent, and with a view to give a preference to the defendant or the firm of which he was a member, overthe other creditors of said Anderson, and if said sale was made on the 9th and 11th May 1842, and a petition was filed against said Anderson by his creditors in the district court of the United States for the district of Missouri on the —— day of June 1842, for the purpose of causing him to be declared a bankrupt by said court, upon the said petition, then the said sale was a fraud on the bankrupt law, and is void.

2d. That even though the account in controversy was sold by the assignee in bankruptcy of John J. Anderson, and purchased by John B. Camden, before the institution of this suit, this suit is properly brought in the name of the said assignee Darby, to the use of said Camden.

3d. That upon the facts as herein, the defendant is not entitled to set off the demands of L. A. Benoist & Co. upon John J. Anderson against the plaintiff's demand.

4th. That as to the goods purchased by defendant's wife of John J. Anderson, the defendant cannot set off against the same, the indebtedness of Anderson to the firm of L. A. Benoist & Co.

5th. That the defendant cannot set off in this action any demand due from Anderson the bankrupt before his bankruptcy to the firm of L. A. Benoist & Co., provided the sale was made by Anderson to said defendant or to said firm in contemplation of bankruptcy and with a view to give a preference to the defendant or his said firm over the other creditors of said bankrupt.

6th. That if said Anderson sold the defendant merchandize to the value of \$226 on the 11th May 1842 knowing at the time he was in-

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solvent, and if the defendant was also aware at the date of said purchase that Anderson was insolvent, and if the said purchase was made by defendant and the said sale was made by said Anderson with a view to give the defendant a preference over the other creditors of said Anderson, and if the said Anderson was not then indebted to the defendant nor became so before he was decreed a bankrupt, and if said Anderson was afterwards decreed a bankrupt in due form and the plaintiff Darby was appointed and qualified as his assignee in bankruptcy, then, the plaintiff is entitled to recover notwithstanding, that said Anderson at the date of said purchase was indebted to the firm of L. A. Benoist & Co. in a sum exceeding the amount of said purchase.

7th. That the defendant having filed no plea of the statute of limitations nor set up any such defence in the pleadings cannot now rely upon the same as a defence to this action.

8th. That if the firm of L. A. Benoist & Co. in proving their claims against the estate of said bankrupt, before Thomas Watson, the commissioner in bankruptcy voluntarily entered upon their account a credit for the amount of the bill of goods purchased by the defendant of said bankrupt prior to his bankruptcy, the entering of such credit and the allowance thereof by said commissioner is no bar to the plaintiff's recovery.

Which the court gave and the defendant excepted.

The court thereupon found a verdict for the plaintiff for the amount claimed by him with interest thereon.

The defendant filed a motion for a new trial, assigning the usual reasons, which was refused and he excepted and has brought the case here by appeal.

In the introduction of evidence, the plaintiff offered to read a transcript from the records of the district court of Missouri to which the defendant objected, because the certificate of the clerk was not conclusive that the record offered, contained a full, true and perfect transcript of *all* the proceedings had in that court on the subject therein contained. The transcript was offered to prove that John J. Anderson had been declared a bankrupt, and that John F. Darby had been appointed his trustee, facts which had been admitted by the pleadings in the cause and therefore unnecessary to be proven. There was therefore no error committed on this point.

The next objection taken by the defendant, was to the evidence of Bacon, who testified as to the public and his own opinion of Anderson's pecuniary condition. Under the general rule governing evidence, this

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would not, perhaps, be admissible: but this general rule, like all others, is subject to exceptions, and we concur in the correctness of the exception laid down by the supreme court of Louisiana in the case of *Brander vs. Feraday*, 16 Low. R. 296, and recognized as law by *Mr. Greenleaf* in his treatise on evidence Vol. 1, page 168, and which we think embraces the questions under consideration. The court say that "where particular knowledge of a fact is sought to be brought home to a party, evidence of the general reputation and belief of the existence of that fact among his neighbors is admissible to the jury as tending to show that he also had knowledge as well as they." It is next to impossibility in very many cases to fix a positive knowledge of a fact upon an individual, notwithstanding the interest he may have in being correctly informed, and doubtless is informed thereof, and we cannot see the injustice of permitting a party to raise a presumption of knowledge in such a case by showing that the community are informed on the subject, and hence the party interested may also have similar knowledge.

The next exception is to the ruling of the court, on the defendant's application to have John B. Camden, sworn as a witness. It is a recognized and well settled rule of the common law, that actual and real parties to the suit, whether they are named on the record as such or not, are not compellable to give evidence against themselves, either in civil or in criminal cases. 1 Greenl. Ev. 401, sec. 330, where it is remarked that whatever may be said by theorists, as to the policy of the maxim *Nemo tenetur seipsum prodere*, no inconvenience has been felt in its practical application. On the contrary, after centuries of experience, it is still applauded by judges as a rule founded in good sense and sound policy, and it certainly preserves the party from temptation to perjury, &c. Then by the common law the defendant was not entitled to the evidence of Mr. Camden, who is the real party in the action, nor had he taken the necessary steps under our statute (R. C. p. 818, sec. 12 and fol.) to entitle him to call on the plaintiff to testify.

The next question is, was the action rightfully brought in the name of the assignee of the bankrupt? By the provisions of the third section of the bankrupt law, it is declared "that all the property and rights of property of every name and nature, and whether real, personal or mixed, of every bankrupt, &c., shall by mere operation of law, *ipso facto*, from the time of such decree, be deemed to be vested out of such bankrupt, without any other act, assignment or other conveyance whatsoever, and the same shall be vested by force of the same decree, in such assignee as from time to time shall be appointed by the

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proper court for this purpose, &c., and the assignee so appointed shall be vested with all the rights, titles, powers and authority to sell, manage and dispose of the same, and to sue for and defend the same, &c., as fully to all intents and purposes as if the same was vested in, or might be exercised by such bankrupt before or at the time of his bankruptcy declared as aforesaid." Here then is a full substitution of the assignee to all the rights of the bankrupt. The act does not control the estate of the bankrupt further than to transfer it to the assignee in whose hands it is subject to the same legal rules as though it remained in the bankrupt. If, therefore, the bankrupt could not transfer or assign his choses in action so as to give the purchaser the right of suing in his own name to recover the same, neither can the assignee; and most clearly the bankrupt could not do this. We conclude, therefore, that the action was properly brought in the name of Darby, the assignee, in whom was the legal title by operation of law, to the use of John B. Camden, who by his purchase had acquired the equitable right to whatever might be recovered in the action.

The defendant not having pleaded the statute of limitation, by a plea to the declaration, nor given notice under the general issue, that he would set up the statute in defence to the action, cannot entitle himself to its provisions by asking an instruction of the court; therefore the court properly refused the instruction on that point.

Nor can he defend himself on the ground that he voluntarily gave a credit on his account exhibited against the bankrupt before the commissioner, if the purchase was made by him with a knowledge of Anderson's insolvency, to obtain thereby a preference over the other creditors.

The second section of the bankrupt act provides "that all future payments, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, endorser, surety or other person, any preference or priority over the general creditors of such bankrupts, and all other payments, securities, conveyances or transfers of property, or agreements made or given by such bankrupt in contemplation of bankruptcy to any person or persons whatever, not being a bona fide creditor or purchaser, for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act, and the assignee under the bankruptcy shall be entitled to claim, sue for, recover and receive the same as part of the assets of the bankruptcy, &c."

To permit one creditor to come in and thus obtain a set-off for the

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entire amount of his indebtedness to the bankrupt, would be giving him an advantage over the other creditors who, under the fifth section of the act, would only be entitled to receive a pro rata distribution of the bankrupt's estate in discharge of their demands against him.

It remains to examine the principle contained in the second instruction asked by the defendant, and refused by the court, and involves the plaintiff's right to a recovery in an action of assumpsit. The case of Smith vs. Hodson 4 T. R. 211, is a leading case on this question and appears to be decisive of the point. The statement of the case is, if a bankrupt on the eve of his bankruptcy fraudulently delivers goods to one of his creditors, the assignees may disaffirm the contract and recover the value of the goods in trover; but if they bring assumpsit, they affirm the contract, and then the creditor may set off his debt.

In commenting on the case, Lord Kenyon C. J., says it is expressly stated in the case that the goods in question were delivered by the bankrupts to the defendant with a view to defraud the rest of the creditors, and therefore an action might have been framed to disaffirm the contract, which was tinctured with fraud, for if the assignees had brought an action of trover, they might have recovered the value of the goods. And again, "but this is an action on the contract, for the goods sold by the bankrupt, and although the assignees may either affirm or disaffirm the contract of the bankrupt, yet if they do affirm it they must act consistently throughout; they cannot, as has often been observed in cases of this kind, blow hot and cold, and as the assignees in this case treated this transaction as a contract of sale, it must be pursued through all its consequences, one of which is, that the party buying may set up the same defence to an action brought by the assignees, which he might have used against the bankrupt himself, and consequently may set off another debt which was owing from the bankrupt to him." See also 2 Str. 859, 1 Atk. 128, 7 East 164, 9 B. & C. 59, 1 T. R. 378, 7 R. & C. 310.

If, then, the bringing of this action of assumpsit by the assignee is an affirmation of the contract between the bankrupt Anderson and the defendant Benoist, as above held, the consequence is that the plaintiff cannot recover, for the contract was that the amount of the goods obtained from Anderson was to be credited on the defendant's account against Anderson. This account greatly exceeded the amount of the goods purchased.

The circuit court therefore erred in refusing to give the second of the

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defendant's instructions, and its judgment should therefore be reversed.

And judge Scott concurring, the judgment is reversed and the cause remanded.

JACKSON vs. EDDY AND OTHERS.

1. If a lessor by his wrongful act defeats the enjoyment of the property by the lessee, the latter may abandon the possession of the premises and exonerate himself from liability to pay rent.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

EAGER & HILL for appellant.

The judgment ought to be reversed for the following reasons :

1st. Because the condition in which the premises were, when leased to the defendant, was not afterwards changed, and the defendants before they entered, knew the situation of the premises, the dampness in the rear of the store, and *agreed to repair*, by reason of which they had no right to abandon for any cause existing at the time of their entrance into possession. *Westlake vs. De Graw* 25 Wren. N. Y. 669.

2d. There was evidence showing the occupancy of defendants during the third quarter, their control of the premises, that they offered them for rent, and the court erred in refusing to leave the questions to the jury arising upon this evidence as asked by plaintiff in the 1st and 3d instructions.

3d. The court erred in instructing the jury, that the circumstance of leaving the keys with the boy (not plaintiff's agent) which were the same day returned, was sufficient to operate as a surrender of the premises and exonerate the defendants from the rent, by reason of the dripping of the salt and tar, *because* the defendants after that paid rent of second quarter, and occupied and exercised control over the premises and offered them for rent.

4th. There was no evidence to support the last clause of the 1st instruction given by the court, "*and offered to surrender the possession to the plaintiff.*" The keys were given to a boy not the plaintiff's clerk or agent.

5th. The court erred in refusing to give the instructions asked by the plaintiff, which put the questions in the case as to occupancy and eviction and surrender of possession fairly and legally to the jury.

The authorities cited by plaintiff, are Taylor's Land and Ten. 174, 183 and 297; *Surplice vs. Farnsworth* 49 Eng. Com. Law Rep. 576; *Sutton vs. Temple* 12 Meeson & Welsley (Ex.) 52 and *Hart vs. Windsor* 12 Meeson & Welsley 68.

JACKSON vs. EDDY and others.

TODD for appellees, insists :

1st. That they were evicted by the wrongful act of the appellant and thereby released from all liability for rent upon the lease or otherwise. 8 Cowen 727, 3 Campbell 513, 25 Wend. 445, 4 Phillips Ev. p. 58.

2d. The appellant ought not to recover any thing upon the count for use and occupation.

1st. Because no recovery can be had upon this count except where the relation of landlord and tenant exists, either by an express or implied contract. 3 Mo. Rep. p.286; 14 Mass. 93; 6 J. R. 46 ; 13 do. 240. In this case this relation is proved by an express contract which excludes an implied one. But it has been shown that there can be no recovery upon the express contract.

2d. Indebitatus assumpsit for use and occupation is a purely equitable action and a recovery therein must be *ex equo et bono*, 13 Wend. 488. In this case the appellees by the wrongful act of the appellant were deprived of, and lost *all* beneficial use of the premises for the quarter sued for. To recover in such a case would be *contra bonas mores*. 8 Cow. Rep. 731, 737; 1 Denio Rep. 37, 41.

3d. As further evidence that the appellant cannot have the benefit of any implied contract with the appellees the appellant by his note to the appellees accompanying his return of the key to them, declared he would abide by the lease.

4th. From the nature of the case the eviction was necessarily a total one and therefore as there could not be any apportionment of the rent, so as the appellees never re-occupied, nor were unwilling that the appellant should occupy nor were in his way, therefore there can be no recovery upon a *quantum meruit*.

3d. As there was a total eviction by the appellant and therefore from the nature of the case, no occasion for a surrender and as the appellees never re-occupied nor did or said any thing in opposition to or inconsistent with the appellants occupying, but were always willing that he should ; the instructions of the court were substantially correct and covered the law and the merits of the case and the court therefore did not err in giving them, nor in refusing those of the appellant.

4th. The verdict and judgment were for the right party and therefore the court did not err in refusing the motion for a new trial.

McBRIDE, judge, delivered the opinion of the court.

This was an action of assumpsit brought by Jackson against Eddy in the St. Louis court of common pleas. The declaration contained three counts: the first two were upon a letting in writing, not under seal, from the appellant to the appellee of a certain cellar and room next above, of a store in St. Louis from 1st Feb. 1845 until 1st Nov. following, being nine months, for \$487 50, payable quarterly the sum of \$162 50. The third count was indebitatus assumpsit for \$375 owing said appellant by said appellee for the use of said premises &c. The sum claimed in the suit was \$162 50 for the last quarter's rent.

The defendant pleaded, 1st, non assumpsit, 2d, that the plaintiff had evicted and turned defendant out of the possession of the premises-- issue to the second plea.

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A verdict was found for the defendant, when the plaintiff moved for a new trial, assigning the usual reasons, which was refused, and he excepted and brings the case here by appeal.

The facts of the case, as we gather them from the bill of exceptions, are as follows:

Jackson rented the premises in question for the term and sum above mentioned to Eddy, who agreed to make all the repairs which he deemed necessary, and to return the premises, at the expiration of the lease. Eddy took possession under the lease, and occupied until about the 1st August following, when he sent the key to the plaintiff's room, and it was delivered to a boy about 14 years old, who gave it to the plaintiff on his return to the store. Plaintiff returned the key with a note to the defendant, saying that he would abide by the lease. The defendant then put a card on the door "To let—apply to J. P. Eddy & Co." and retained the key until the expiration of his term. There was some conflict in the evidence as to the condition of the store: it appears, however, that the plaintiff occupied the room overhead as a grocery store—that the dripping of the salt, tar &c. in store occupied by him passed through the floor, and upon the sugar hogsheads, brooms &c. in store occupied by the defendant below: that the defendant complained to the plaintiff, who endeavored to prevent it by sprinkling saw dust on the floor above, which, however, only stopped the leakage temporarily. The room was about 100 feet long, and the leakage extended about 25 feet over the back end of the room. The plaintiff occupied the upper room as a wholesale grocery store prior to and at the time he rented to the defendant the room below and the cellar. The condition of the room below remained in about the same condition it was when the defendant rented it, except that occasionally the leakage from the salt and tar was worse than at other times.

The plaintiff asked twelve instructions, embracing much of the common law doctrine governing the relation of lessor and lessee, which the court refused, and gave to the jury the two following instructions:

"If the jury find from the evidence that the store leased by the defendants of the plaintiff was rendered unfit for use as a store, by reason of leakage from the part of the building occupied by the plaintiff, and continued untenantable for the same reason after the defendants had remonstrated with the plaintiff, and that, previous to the time for which rent is claimed, the defendants had abandoned the premises to prevent injury to their goods from the leakage aforesaid, and offered to surrender possession to the plaintiff—they will find for the defendant."

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"If the jury find from the evidence the facts supposed in the above instruction, they will find for the defendant, although it should appear from the evidence that the defendants retained possession of the key after it was refused by the plaintiff, and offered the store for rent."

What acts done by a lessor will amount to an eviction and authorize the lessee to surrender and acquit himself of liability to pay rent, appears not to be very clearly settled in the books. Some courts have held that an actual eviction of the lessee from the premises leased, either by a title paramount to the lessors, or by the lessor himself, would alone enable the lessee to resist the payment of rent; because it is said, if the wrongful act of the lessor does not actually oust the lessee of possession, he may be compensated by an action of trespass for any injury done to his possession. Other courts have gone a step beyond this, and have held that a partial eviction, that is, an eviction from a part of the premises leased by the landlord, will authorize the lessee to abandon and discharge him from liability for rent: whilst others have decided that any act of the lessor which defeats the enjoyment of the property by the lessee is a good bar to the demand for rent, provided the lessee abandon the possession in consequence of such wrongful act of the lessor. These different opinions underwent a review by the court of errors of New York, 8 Cow. 728, when the latter doctrine was maintained as being most rational and equitable.

The consideration of the lessees undertaking to pay rent, is the quiet, peaceable and indisputable possession of the premises leased, and is, in its nature, a condition precedent to the payment of rent. If the lessor by any wrongful act disturbs that possession which he should protect and defend, he thereby forfeits his right, and the lessee may abandon the possession of the premises leased, and thereby exonerate himself from liability to pay rent.

In this case, the court by its instruction submitted the question to the jury to find whether by the conduct or acts of the plaintiff, the store-room occupied by the defendant was rendered unfit for use as a store, and that, in consequence thereof the defendant had surrendered the possession. The jury having found these facts, their verdict was properly given for the defendant.

We do not deem it necessary to comment on the several minor points raised in the case. The main question involved was fairly put to the jury, and we see no ground for disturbing their verdict. Wherefore the judgment of the circuit court ought to be affirmed, and, the other judges concurring, the same is affirmed.

COHEN, Garnishee of MAZALSKI, vs. WOLFFE & HOPPE.

COHEN, GARNISHEE OF MAZALSKI, vs. WOLFFE & HOPPE.

1. A debtor in failing circumstances transferred to one of his creditors two stocks of dry goods to secure his debt. Upon an inventory of the goods at their prime cost the amount greatly exceeded the debt. They were sold by the creditor at auction and the proceeds of the sale fell short of the debt. Held,

That if the creditor made no unnecessary sacrifice of the goods he is accountable only for the proceeds obtained through the auction sale.

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HART & REBER for appellant.

1st. That the finding of the jury was not warranted by the evidence.

2d. As the affirmative of the issues was on the side of the plaintiffs, they must be held to show with reasonable certainty that the defendant was chargeable, and not only so, they must also show that he was chargeable with a *definite amount*, and for failing to show either of these things, it is contended with confidence that they should have failed in their action. Chitty's Pl. p. 386; Harvey and others assignees of Bank & Joseph vs. Archbold et al, 3 B. & L. 626; (10 Eng. Com. Law 203.)

3d. Supposing Cohen acted in bad faith (a supposition however not warranted by the facts) in not disposing of the goods to the best advantage, and so did not realize from them more than enough to pay himself, it is submitted that the claim which Mazalski might have had against him on that account, is not such a "credit" as could be attached or garnished.

4th. It is submitted that Mazalski had no right to sue Cohen at the time he was summoned as garnishee, and that his creditors could not be in a better position than he was. Jewett vs. Bacon 6 Mass. 60; 2 do. 503.

5th. It is submitted that the justice has no jurisdiction between the plaintiff and appellee in this case, and the garnishee Cohen appellant, for it clearly appears from the denial of the answer of Cohen, that the appellant is charged by the appellees with having in his hands and under his control goods and monies to a much larger amount than the jurisdiction of the justice would authorise him to hear and determine, and although the justice had lawful jurisdiction between the original parties to this suit, it being predicated on a note, yet if the issue between a plaintiff and a garnishee goes to an amount larger than ninety dollars (\$90) and that upon an open account or in any other way not embraced in the introductory part alluding to jurisdiction on bonds and notes, of the 1st sec. article 2d, attachments, Revised Code, it is submitted that the justice loses by law any further jurisdiction and the plaintiffs must seek their remedy in the circuit court against the garnishee Cohen.

Revised Code, attachment, art. 2 sec. 1st, 29th, 47th, and 48th.

FIELD & HALL for appellees.

The appellees insist, that the court below committed no error in the instruction given, and that the jury found in accordance with the instruction, and the evidence in the case.

It sufficiently appears from the evidence that the garnishee had received from Mazalski goods to a large amount, for which he was to account after paying his own debt. That his own debt had been paid and that property still remained in his hands, after paying his own

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debt, and for this amount he was liable to Mazalski and of consequence to the creditors of Mazalski.

The principle seems so plain as to require no authorities to be cited to support it.

McBRIDE, judge, delivered the opinion of the court.

Wolffe and Hoppe sued one Mazalski by attachment before a justice of the peace, and summoned Cohen as garnishee, who appeared and answered the interrogatories filed against him, in which he denies any indebtedness to Mazalski: issue was taken on the answer, a trial was had, and verdict and judgment in favor of the garnishee, Cohen, when Wolffe & Hoppe appealed to the court of common pleas.

Upon the trial in the court of common pleas, evidence was given to establish a fraudulent sale and conveyance of a stock of goods in Dubuque and another in Galena, by Mazalski to Cohen; or, if the sale was not fraudulent, the goods were worth greatly more than the sum due from Mazalski to Cohen.

The garnishee, Cohen, introduced evidence to prove that the sale of the goods to him was a bona fide sale, to satisfy an existing demand due him by Mazalski, and that from the sale of the goods he did not realize a sufficient sum to pay his debt. The evidence was somewhat conflicting.

The jury found for the plaintiff; the garnishee moved for a new trial, which being overruled, he excepted and appealed to this court.

The only question of law in the case arises out of the following instruction given at the instance of the plaintiff:

"If the jury find from the evidence that the defendant, Cohen, received of Mazalski more than was sufficient to pay the indebtedness of Mazalski to said Cohen, and that said Cohen was to account to the said Mazalski for the balance of said goods after paying said Cohen his debt, the jury will find for the plaintiff the amount of their debt, if such amount is now in the hands of said Cohen."

To make the point involved more intelligible, it is necessary to refer to some of the leading facts in the case.

It appears from the evidence that Mazalski was indebted to Cohen, and, being in failing circumstances, conveyed two stocks of dry goods, one at Galena and the other at Dubuque, to Cohen, to secure the debt which he owed him. Cohen took an inventory of the goods, which at their prime cost amounted to considerably more than his debt; he then removed the goods to St. Louis, where he sold them at auction; the

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amount realized from the sale fell short of paying his debt against Mazalski.

The instruction above given assumes that Cohen is liable for the value of the goods received by him without regard to the amount realized from the auction sale. Now if the general practice be, as we suppose it is, to sell such goods at auction; and if, in doing so, Cohen acted in good faith, making no unnecessary or uncalled for sacrifice of the goods, he can only be held accountable for their proceeds, obtained through the auction sale. This, we say, is the measure of his liability, on the assumption that the transfer of the goods to him was made *bona fide*, and their sale fairly conducted. If Mazalski was not indebted to Cohen, or if the transfer of the goods was made in fraud, or the goods unnecessarily sacrificed, then Cohen would be liable for their value at the time he received them.

Therefore the judgment of the court of common pleas ought to be reversed, and, the other judges concurring, the same is reversed, and the cause remanded to that court for a new trial.

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1. The facts that a vendor was a man afflicted with chronic disease, and the purchaser was his family physician, will not warrant an inference of fraud, especially when there are no attending circumstances to corroborate such an inference.
2. After a chancery cause is fully submitted upon hearing, it is discretionary with the chancellor either to dismiss the bill without prejudice, or render a final decree. When this discretion has been soundly exercised by the chancellor, his action will not be disturbed by the supreme court.

APPEAL FROM ST. LOUIS CIRCUIT COURT.

STATEMENT OF THE CASE.

This was a suit in chancery instituted by the appellants who are the widow and heirs of John Doggett deceased, against the appellees, to set aside a conveyance alleged to have been made by the said John Doggett in his lifetime, to the defendant Lane, of a tract of land in

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St. Louis county, containing 672 arpens. The deed bears date 1st day of June, 1829, and was acknowledged on the same day before Jos. C. Brown, a justice of the peace, and subsequently recorded. The consideration expressed in the deed is \$350, the bill alleges that at the date of this deed John Doggett, the grantor, was greatly reduced by disease, insomuch that his mind was greatly impaired, if not entirely gone; that he had been for some time before that date suffering from protracted sickness, which continued gradually to grow worse until he finally died of it in 1831. That from the time of his first attack, which was prior to June, 1829, (the date of the deed) his mind and body were both so much impaired as to wholly disqualify him from managing his business with care and prudence, and that the disease which was paralysis, was of a nature which necessarily impaired his mental faculties, and ultimately rendered him entirely imbecile. That during the whole of this period the defendant Lane was his family physician, and availing himself of the said Doggett's enfeebled condition and of his (Lane's) influence over him, and whilst Doggett was thus prostrate with disease, both bodily and mental, prevailed upon Doggett to execute the deed aforesaid. That the three hundred and fifty dollars named as the consideration, was in fact never paid by Lane, except so far as his bill for medical attendance went. That he paid nothing except in the way of medical services, and they did not amount to \$350. That the land was then very valuable and worth at least ten times as much as Lane professes to have paid for it. That the deed was therefore fraudulent and obtained by undue influence, and for a merely nominal consideration. The bill also sets out Doggett's title to 350 arpens of the tract and describes the land particularly. One hundred acres of the tract was conveyed by Wm. Massie, who claimed under Samuel and Amos Duncan, the confirmees to David Barton, and by the latter to said Doggett; the said Wm. Massie having died, Chas. S. Hempstead, adm'r of Christian Wilt obtained a judgment against the adm'r's of said Massie, upon which an execution issued in the year 1824, which was levied upon 249 arpens, part of the said tract of 672 arpens, and at a sale of the same by the sheriff under said execution, the said Doggett became the purchaser of the said 249 arpens, which was accordingly conveyed to him by the sheriff. In this way Doggett acquired title to the 100 acres purchased of Barton and the 248 arpens purchased at sheriff's sale.

The bill further states that as to the remainder of the tract of 672 arpens the complainants are not advised how Doggett acquired title, but that for many years before his death he was in the quiet possession and enjoyment of it, and that after his death up to the time of bringing this suit his widow and children had continued to reside upon and occupy the land, claiming it under the said Doggett, who, in his lifetime, claimed to own the tract, and the complainants have no doubt he had a valid title thereto. They call upon Lane to answer as to the condition of Doggett's health, mental and bodily, at the date of the deed, and to state what consideration he paid and how and when he paid it, and pray that the conveyance be set aside as fraudulent.

An amended bill was afterwards filed charging in substance that the defendant, Ewing, now claimed to be the owner of all the interest acquired by Lane under the deed from Doggett, and that Lane disclaimed all further interest in the property. But that Ewing's title, if he had any, was only colorable. That he was in fact holding in secret trust for Lane, who was the real owner, and that if Ewing had in fact purchased from Lane, he purchased with notice of the fraudulent manner in which the deed was obtained and stood in no better position than Lane himself.

Ewing in his answer denies all knowledge of the manner in which the deed from Doggett to Lane was obtained and all notice of any fraud in obtaining the same, but believes it was fairly obtained. Denies also Doggett's insanity or imbecility, and claims that on 21st Nov., 1842, he (Ewing) purchased at sheriff's sale under execution against Lane all his right and title to the said tract at the price of \$10, and received a deed from the sheriff therefor. That in order to perfect his title to said tract and other property he had previously obtained control

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of the judgments under which the said tract was sold, forwhich judgments he paid over \$2000. That he has also purchased a conflicting claim of one Jno. B. Raney to a portion of said tract for which he paid \$240. That on 1st Dec., 1843 the said tract was also sold for taxes, at which he Ewing, bought it. Denies also that he holds in trust for Lane, but claims that he purchased on his own account, and with his own funds, and that Lane has no interest in it.

Lane in his answer admits that Doggett was in possession of a part of the tract of 672 arpens in his lifetime, but not of the whole tract, and denies that Doggett ever claimed to own the whole tract. That his title was exceedingly defective as to any part of the tract except the 100 acres bought of Barton. That in Dec., 1827, Doggett proposed to sell him his interest in the tract for \$350. That he, Lane, took time to consider of it, and in March of the next year, concluded to accede to the offer, and so informed Doggett, when the trade was agreed upon. That between that day and the 1st June following, he made payments to Doggett, and assumed debts for him to the whole amount agreed to be paid, on which day the purchase money being thus fully paid, a deed was executed by Doggett and wife. On the said 1st June, the payments he alleges were made as follows: Five dollars cash on 6th March, the day the bargain was closed. On same day executed his note to Doggett for \$100, payable twelve months after date, which was paid at maturity. \$52 agreed to be due for medical services. On 28th May, 1829, paid Doggett one hundred dollars cash and gave him at same time an order on Hough for ten dollars. The balance was paid in debts assumed for Doggett to N. W. Whistler and others. Denies Doggett's insanity or imbecility at date of the deed, or at any other time so far as he knows or believes, except for a few hours at a time, during periods of severe illness. Denies all fraud or imposition, on the contrary, insists that at the date of the purchase Doggett was perfectly sane and rational, and the purchase was made at his urgent request. That the complainant, Nancy, his widow, was present at the time, knew his condition and voluntarily signed the deed and relinquished her dower. That since that time said Nancy has often received favors and professional advice from him and has never complained of any unfairness. Says there were several conflicting claims to said land, and that Doggett's title was not worth three hundred and fifty dollars at the time. Sets out several conflicting claims which he has since purchased to said land, for which he paid 2,090 dollars, including what has been since paid by Ewing, all of which claims he says were known to Doggett and himself at the date of the said deed. Admits that after the purchase from Doggett he permitted Doggett to occupy a portion of the tract up to the time of his death, and after that as his family were poor, he permitted his widow and children to reside there, always, however, as tenants at will. Denies that he has now any interest in the tract, but that the same was sold to Ewing under execution as stated in Ewing's answer, and that Ewing does not hold in trust for him, but purchased on his own account and with his own funds.

General replications were filed to the answers of Lane and Ewing, and upon the hearing, several witnesses were examined on the part of the complainants who testified to their belief that at or about the 1st June, 1829, and some of them prior thereto, and from thence up to the time of Doggett's death, he was greatly enfeebled in body and mind, that his mind was so impaired as to render him incapable of transacting business with prudence. That he was subject during the whole period to convulsions, and finally became completely paralized and died in that condition, about two years after the date of the deed to Lane, some of these witnesses considered him deranged for several years before his death and gave the reasons for that opinion founded upon his conduct and conversation. In their estimate of the value of this tract of land in June, 1829, they ranged from four dollars to ten dollars per acre, none of them fixing it at less than the former sum. See the testimony of James Biasell, St. Cyr. Brazeun, Chick, Gardner, Ranney, Graham, Quick. Mrs. Jackson.

Defendant on his part introduced several witnesses, and amongst others Joseph C. Brown,

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one of the subscribing witnesses to the deed from Doggett to Lane, and who was the justice who took the acknowledgement of the deed at the request of the defendant Lane. He testifies that at the time of the acknowledgment of the deed, Doggett was sick in bed, but was convalescent. That he seemed to be rational and to understand what he was doing. That the witness saw nothing in his deportment to excite any suspicion that he was not capable of transacting business and did not fully understand what he was about. If he had observed any thing to the contrary, he would not have taken the acknowledgment. That the defendant Lane delivered the deed to witness at the city of St Louis and requested him to call at Doggett's residence and take the acknowledgments, which he accordingly did at the residence of Doggett, Dr. Lane not being present.

This and the other witnesses for defendant testified that although Doggett was in feeble health for several years before his death, he was in the habit of going about the neighborhood, and to the city, and they saw nothing to justify the belief that he was either insane or incapable of transacting business with prudence and discretion. Hyatt, one of said witnesses, proves that on 30th January, 1830, he (witness) as admr. of widow Whistler, sold at auction the effects of her estate. That Doggett was at the sale and bought some articles to the value of \$68 50, and gave his note with security for the amount. That he was pale and emaciated, but walked around from place to place as the articles were sold, and witness then nor at any other time saw any symptoms of mental alienation. When the note became due, in January, 1831, Doggett referred him to Dr. Lane for payment, and it was paid by Lane. Witness about same time held note on Doggett, due to Sullivan's estate when it became due, Doggett referred him to Lane, who paid it. Doggett said Lane owed him, but did not state on what account. See also testimony of Murray, Milburn, Cerre, Goodwin and White.

Defendant also read in evidence several deeds and other instruments to show that the title to said tract was not only perplexed, but that defendant Lane, and after the sale to Ewing, the latter had been compelled to pay out considerable sums to purchase in outstanding titles or claims to said lands.

They also read in evidence the sheriff's deed to Ewing for Lane's interest in this and sundry other tracts.

At the hearing after the testimony was closed, the complainants moved to dismiss their bill without prejudice, but the court refused to allow it, to which the complainants excepted. The court upon the hearing dismissed the complainant's bill absolutely and refused the relief prayed for. The complainants moved for a re-hearing for the usual reasons, which the court overruled, and the complainants appealed.

CROCKETT & BRIGGS for appellant.

1st. That the proof shows that at the date of the deed from Doggett to Lane, the former was *non compos mentis*, and therefore the deed is void.

2d. That Doggett if not actually insane, was so enfeebled in body and mind by long disease, as that the least unfairness or want of good faith on the part of Lane, will vitiate the deed, and in this case there was such unfairness deducible from inadequacy of consideration and the relation of the parties. Deutley's heirs vs. Murphy, 3 Marsh R. 479.

3d. In equity fraud includes all acts, omissions, and concealments which involve a breach of either legal or equitable duty, trust, or confidence, and are injurious to another, or by which an undue and unconscientious advantage are obtained. In this case there were such acts, omissions, and concealments, as involved a breach of trust and confidence on the part of Lane. Belcher vs. Belcher, 10 Serg. R. 121; 4 Dana 309. Buffalow vs. Buffalow, 2 Dev. & Batt 241.

4th. That Lane being the relative of Doggett, and also his family physician, they stood towards each other in relations of confidence, and in such cases if there appear the least speck of fraud or

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imposition in obtaining the conveyance, it will be set aside, *in the hands even of an innocent purchaser for a valuable consideration.* The court will undo the whole transaction. Whelan vs. Whelan, 3 Cow. 537; Livingston vs. Hubbs 2 John C. R. 512.

5th. That fraud may be inferred from great inadequacy of price, or from the vendee being in a situation to exercise undue influence over the vendor. Gist vs. Fraser 2 Litt 118. In this case both reasons exist for setting aside the deed.

GEYER for appellees.

1st. The deed from Jno. Doggett to Wm. C. Lane which the bill seeks to set aside, was fairly obtained and a full consideration paid by the grantee. The allegations imputing fraud to the defendant Lane, are denied by the answer and disproved by the evidence. So far from there being any fraud or imposition, the grantee was not present at the execution of the deed nor within ten miles of the place.

One of the subscribing witnesses who took the acknowledgment of the deed, testifies to the capacity of the grantor and the whole case shows that the defendant Lane, was the loser, and Doggett the gainer; the one in buying and the other in selling a doubtful title, at all events it appears that Lane had a hard bargain.

2d. The Defendant Ewing is a purchaser of the property at sheriff's sale, upon judgments and executions against Lane without knowledge of any of the circumstances attending the conveyance by Doggett. He denies all knowledge of any fraud or imposition in obtaining that conveyance or that he had any reason to suspect the existence of any. He negatives the allegation that he purchased or held the property for the benefit of Lane. There is no testimony proving or tending to prove any one of the allegations against Ewing. He must be regarded as a bona fide purchaser for a valuable consideration without notice of any unfairness on the part of Lane, and this alone defeats the whole bill.

2d. The case was heard fully in the circuit court on the merits, and it does not appear that the court exercised its discretion unsoundly in refusing to allow the complainants to dismiss their bill without prejudice. The dismissal of a bill without prejudice does not depend upon the discretion of the complainant which the court *must* allow for the asking. It depends on the exercise of sound discretion of the court and cannot be demanded as a matter of right without cause shown. In this case there was not even a suggestion that the complainants had been taken by surprise, or that they could supply any defect in the evidence, or in any manner make their case better. A similar attempt was made in the same court in McNair vs. Biddle and others. It was unsuccessful in the circuit court, and met with no favor in this court, although the decision was excepted, and complained of in the appeal. The practice if once tolerated would perpetuate litigation and encourage experiments in the supreme as well as the inferior courts.

NAPTON, judge, delivered the opinion of the court.

The course which this case took in the circuit court would seem to indicate that the counsel who managed the case there did not have much confidence in the point which is solely relied upon for the reversal of the decree. At the hearing before the circuit court, a motion was made by the complainant to dismiss their bill without prejudice, and an exception was taken to the overruling of this motion. No point is

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made upon the exception here, and it is now contended that upon the bill, answers and testimony, the complainants were entitled to a decree.

We shall state very briefly some of the reasons suggested by a careful examination of the record, which have induced us to yield a ready concurrence in the disposition which the circuit court made of the cause.

The answer of Lane is full, explicit and utterly contradictory of every allegation in the bill which could lay the foundation of a decree favorable to the complainants. This answer is not attempted to be disproved, except upon the matter of Doggett's incompetency. The testimony on this head will be found substantially set forth in the statement, and it is not, in our judgment, of such a character as would authorize the court to set aside a contract upon the ground of mental imbecility or insanity.

It appears that Doggett, previous to 1829, when this sale to Lane was made, had been afflicted at intervals with convulsions or epileptic fits; that these attacks were succeeded by partial paroxysms which ultimately produced his death, in 1831. No doubt this disease impaired to some extent the mental, as it did the bodily faculties of Doggett, but there is an entire failure of proof to show that at the time of this contract, or even afterwards, there was any thing approaching to insanity, or such continued imbecility of mind as would incapacitate the sufferer from transacting his usual business. Some of the witnesses express an opinion, that at times Doggett was incompetent to manage his own affairs, but no facts are given sufficient to warrant the inference that these opinions were well founded. Every incident related by the witnesses to prove his incompetency may as well be accounted for on a different hypothesis.

If there were circumstances of fraud or imposition in the case, such as gross inadequacy of price, or concealment of facts essential to a proper understanding of the contract, we might look more narrowly into the evidence of incompetency. But Lane's answer disproves every thing like imposition or fraud. His account of the matter, which is entirely uncontradicted, is, that having been on a visit to a patient in Doggett's neighborhood, he happened at his house about night-fall, and at his instance remained all night: that Doggett proposed to sell him his land, and stated his price: that he took time to consider this proposition, and about two months afterwards informed Doggett that he would buy it at the price proposed: that the bargain was thereupon conclu-

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ded, and Lane had a deed drawn up in St. Louis and sent it to Doggett's residence, about twelve miles from the city, by a justice of the peace who is a witness in the case. This justice testifies that the deed was signed by Doggett without question, and apparently with a full understanding of its purport, and that his wife (who is one of the complainants) executed her relinquishment of dower in the usual form, and after having been fully apprized of the character of the instrument. There surely could have been no imposition here, for Lane was not present at the execution of the deed, and when the contract was originally made, Lane was not attending Doggett as a physician, but visiting his house as a friend, and the proposition for the sale came from Doggett.

Nor is there any proof of inadequacy of price. Both Doggett and Lane were aware that Doggett's title was defective. They both considered his title to about seventy acres as good, but as to the balance of the 770 arpens, it was a mere speculation, and so understood by both parties. It cost Lane upwards of \$2,000 to perfect the title, or at least to buy up such claims as were thought to threaten its stability. How are we to say that the price was inadequate? By what critereon shall we determine the value of a speculation of this kind? Doggett thought the price sufficient, as he himself proposed it, and Mrs. Doggett was not dissatisfied with it, as she made no objections, and both had ample time for reflection.

But there is another circumstance stated by Dr. Lane, and confirmed by some of the witnesses, which is entitled to weight. Long after this transaction, and up to Doggett's death, Dr. Lane continued to be on friendly terms with the family. There was a relationship between them, and, after Doggett's death, his widow continued to receive professional services and other acts of kindness from Dr. Lane rendered without compensation, and no intimation was ever suggested of this fraud upon her husband. Mrs. Doggett was permitted to remain in possession of this tract of land for several years after her husband's death, as Dr. Lane's tenant, and this tenancy was repeatedly acknowledged, and continued until the land passed from Dr. Lane to Ewing.

It is not very creditable to Mrs. Doggett to receive favors from a man whom she at the same time believed to have defrauded her husband. In fact her conduct shows most plainly that she did not entertain this opinion of Dr. Lane until shortly before this suit was instituted. The bill was filed in 1845, and the deed to Lane was executed in 1829. An acquiescence for fifteen years in a fraud of this character,

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accompanied as it must have been with a full knowledge of its existence from the time it was perpetrated, ought to be accounted for.

The deed from Doggett to Lane was a conveyance without warranty —a circumstance which confirms the statement of Lane in his answer, that both Doggett and himself were fully apprised of the uncertainty of the title.

Upon the whole, without adverting to the details of the testimony, Dr. Lane's conduct in this transaction seems to have been perfectly upright, and not a single circumstance has been proved tending to cast any suspicion of fraud or imposition. The only facts in the case which could have such a tendency, are, that he was dealing with a man afflicted with a chronic disease, and was his family physician. These facts alone do not warrant an inference of fraud, especially when there are no attending circumstances to corroborate such an inference.

It is useless to consider the case with reference to the defendant Ewing, who was a purchaser under executions against Lane, without notice of the particular character of Lane's title, or the manner in which it was acquired. Whether he would have been affected by Lane's frauds, had any such been committed, we shall not consider, as no fraud was proved upon Lane.

Although the propriety of dismissing the bill generally, notwithstanding the motion of the complainants to have it dismissed without prejudice, is not discussed in the written argument submitted to the court, yet as it is made a point in the assignment of errors, it is proper to dispose of it. After the case was fully submitted at the hearing, without any pretence that any additional facts could be procured, we think the court was fully justified in making a final decree. There must be an end to litigation in chancery as well as in a court of law. The chancellor has doubtless a discretion in such matters, but there was nothing in this case to show that this discretion was unsoundly exercised.

The other judges concurring, the decree is affirmed.

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1. When a juror qualifies himself under the statute, and the presiding judge accepts him, the supreme court cannot say that he committed error in accepting him.
2. Upon an indictment for murder in the first degree, the defendant impliedly admitted the killing, and placed his defence upon the fact that at the time he did the act he was incapable of crime by reason of being insane.

Held.

That if the defendant failed to establish his defence to the satisfaction of the jury, they were bound to find him guilty of murder in the first degree.

3. Upon a plea of insanity to an indictment for murder in the first degree, it is competent for a witness to give his *opinion* as to the state of defendant's mind prior to and at the time he committed the act.

APPEAL FROM ST. LOUIS CRIMINAL COURT.

SHARP for appellant.

1st. The 13th section of article 6th, title practice and proceedings in criminal cases revised statutes of Missouri, page 880 declares "that it shall be good cause of challenge to a juror that he has formed or delivered an opinion on the issue or on any material fact to be tried." Can the true construction of this statute be that such persons as are described in the statute, are competent jurors unless challenged by the defendant? Most certainly not.

2d. The court erred in allowing witnesses to testify to matter which the witnesses stated was said to the defendant jokingly, and for the purpose of relieving prisoner's mind. The objection by the appellant to this act of the court, was that it put in evidence before the jury statements drawn from the defendant by improper inducements, and that the facts so detailed were illegal, improper and entirely irrelevant to the issue.

3d. The court committed gross error in excluding evidence from the jury which was calculated to show the state and condition of defendant's mind, and how far it was affected before the commission of the offence charged in the indictment.

4th. The following question was asked one of witnesses for the defence. "From all that you know of the defendant, what is your opinion as to whether he was or was not an insane person at the time he left your house for Arkansas.

5th. The court erred in excluding from the jury evidence which went to show the treatment which the defendant had received prior to his leaving home, as that of an insane person, and that he was regarded by all who knew him as one of unsound mind.

6th. The court erred in excluding from the jury that part and portion of depositions of Mary Mathews and Nancy Mathews as proved the condition and situation of the defendant at the time he remained in Arkansas.

7th. Passing from a consideration of the errors of the court in withholding proper and legal evidence from the jury, we shall next assign for error the refusal by the court to give the instructions asked for by defendant's counsel, from number one to 17 inclusive, as marked and set forth in the record.

8th. The court erred in giving the instructions contained in the record first, because they are not the law, and secondly, because they were calculated to mislead the jury, and thirdly, because they took the case entirely from the jury.

9th. The court committed gross and wilful error in refusing to instruct the jury when asked by

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them if it was in their power to find defendant guilty of a less offence than that charged in the indictment.

10th. The court erred in granting a new trial, first because the verdict was against law and evidence and against the right of evidence.

11th. The court erred because the jury were permitted to separate and sever, which fact the court refused to hear upon written affidavit, but signed bill of exceptions with this cause assigned for error.

STRINGFELLOW for State.

1st. McCoy and Wise were competent jurors. The opinion formed by the jurors were not such as to prejudice their minds; indeed all bias and prejudice were expressly denied by the jurors.

2d. The evidence objected to and marked exception No. 3, p. 31, was proper; it was one of a chain of circumstances proper to be established. It went to show that Baldwin shortly preceding the murder had no money—to show a motive for killing Mathews, viz :—to get his money.

3d. The objection marked exception No. 4, is too, idle to argue. See p. 41; so too, of objections No. 5, p. 54.

4th. Exceptions No. 7 and 8, p. 54. The witness not being a physician, nor skilled in the nature of disease, could not give his opinion as to the condition of defendant. He could only testify to facts.

5th. The evidence excluded marked ex. No. 9, was clearly illegal; even more objectionable than that excluded in seven and eight; it was even less than the mere opinion of an ignorant witness,

6th. The evidence marked No. 1 and 2, p. 84. 85 was properly excluded. It was incompetent to prove what the witness' father had said of defendant's want of sense, as it was also improper for the witness to give an opinion as to defendant's mental condition.

The interrogatories on pages 111 and 112, which were excluded, proposed to obtain evidence of the same character as that excluded by the court, to wit: the opinions of the witnesses and the statement of defendant's father as to his mental condition, and were properly struck out.

The law governing the case was fully and clearly laid down by the court, and the instructions asked by defendant were either embraced in the instructions given by the court, or were properly refused.

No exceptions, however, appear to have been taken to the giving or refusing instructions.

McBRIDE, judge, delivered the opinion of the court.

At the March term, 1848, of the criminal court of St. Louis county, the grand jury found an indictment against Elisha Baldwin, for murder in the first degree, perpetrated upon the person of his brother-in-law, Victor Mathews, late of the State of Arkansas.

The defendant being in custody, was put upon his trial at the July term of said court, when, conceding the killing of the deceased, the defendant relied upon the plea of insanity, at the time of committing the act charged against him.

The jury found the defendant guilty: whereupon he moved the court

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to grant him a new trial, alleging several reasons therefor, which the court refused, when he excepted to the opinion of the court and prayed an appeal to this court, which was granted.

In the empanneling of the jury a question was raised as to the competency of a juror, and the judge of the criminal court having decided the juror competent, the defendant took an exception to the opinion of that court, and relies upon the point in this court, as error. The juror having been sworn to answer questions, stated that he saw statements in regard to the transaction in the New Orleans public papers; that from these he formed an opinion, and believes that if the statements were true, he has an opinion as to the defendant's guilt or innocence; but he had then no prejudice or bias, nor has he now any against the defendant. That opinion is now unchanged if the facts are as stated; he should be governed solely by the evidence; he has not conversed with any of the witnesses; his opinion depends solely upon what he saw in the New Orleans papers; he has conversed on the subject with persons since his return to St. Louis, but does not know whether or not they are witnesses.

Before the enactment of the provision hereafter referred to, great difficulty existed in obtaining a jury to try a criminal cause, which, by reason of the circumstances attending the commission of the act charged, gave to it general notoriety. Inquisitiveness is a component part of every rational thinking mind; when, therefore, an offence of a high grade, or one of unusual occurrence, or one attended with aggravating circumstances, takes place; it is but natural that it should become a subject of conversation and inquiry with the community in which it occurred. This produces impressions rather than opinions of the guilt or innocence of the party accused, and hence the difficulty, in some cases, of obtaining a jury, from the vicinage, free from impressions, amounted almost to an indemnity for crime. Having witnessed this state of things, and doubtless being desirous to obviate the difficulty as far as practicable, the general assembly of this State passed the following act:

"It shall be good cause of challenge to a juror that he has formed or delivered an opinion on the issue or any material fact to be tried; but if it appear that such opinion is founded only on rumor, and not such as to prejudice or bias the mind of the juror, he may be sworn." R.C. p. 880, sec. 12.

The information upon which the juror predicated his opinion, was derived from newspaper statements, which, of all other sources of intelli-

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gence, are the most uncertain and unreliable ; gleaned, as such matters are, from the streets and alleys, beer houses and oyster cellars of a large commercial city, and without any special pains being taken to ascertain the particulars of the affair. The juror further stated that he had no prejudice or bias on his mind. If, therefore, the question of competency is referable to the juror himself, then he was competent ; but it was not his province to pass upon that question ; he could only state facts, and it was the duty of the court to decide whether, according to the facts, he was competent. In deciding this question, the presiding judge at the trial, having the juror before him, witnessing the manner of his examination, possessing a knowledge of his character is infinitely better qualified than we are to decide whether under all the circumstances, his mind and feelings are in a condition which will enable him to discharge honestly and impartially his duty as a juror. Where the juror qualifies himself under the statute, and the presiding judge accepts him, this court cannot say that an error has been committed.

When the evidence closed, the defendant's counsel asked the court to instruct the jury as follows :

1. That if the jury believe from the evidence that the defendant was of unsound mind previous to the time at which the offence charged in the indictment was committed, and that derangement or unsoundness of mind was such as to leave him without sufficient reason, judgment and will to enable him to distinguish between what was right and what was wrong, with regard to the particular act in question, (the killing of Mathews for violence used upon his, defendant's sister) and unless he knew that the act was a crime against God and nature, they must find him not guilty.

2. If the jury believe from the evidence that the prisoner acted under a false and insane, but sincere belief that the deceased had threatened to kill his sister, and intended to kill his sister, and that from this cause, he, under an uncontrollable impulse killed Mathews, they should find him not guilty.

3. If the facts are such as to satisfy the jury that the prisoner had been laboring under a delusion or particular insanity, or if from his acts and conduct testified to by witnesses, they believe him insane, or resting under a fixed delusion, upon the particular act in question for some time previous to the killing of Mathews, the presumption of law is, that he was so insane when the act was done.

4. If at the time the prisoner fired the pistol at Mathews, he was not

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conscious of doing wrong and had not self control to prevent him from doing the act, they should acquit the prisoner.

5. As to the question of insanity or unsoundness of mind, the true point for the jury is not whether the prisoner was capable of distinguishing between right and wrong generally, but whether he knew in the particular case, with reference to the act in question that he was committing an offence against the laws of God and nature.

6. That if the evidence in the cause is such as to satisfy the jury that the prisoner was insane or of unsound mind previous to his going to Arkansas, and previous to the killing of Mathews, they must acquit him, unless they believe from the evidence, that the prisoner had recovered his reason and was of sound mind at the time the offence charged was committed.

7. That if the preponderance of evidence was in favor of his insanity or unsoundness of mine—if its bearing as a whole inclined that way, they should find him not guilty.

8. That as it is difficult to draw the line of demarkation and say, where soundness of mind ends and insanity begins, the jury should be governed by facts and circumstances showing the condition of the prisoner's mind, and if from those facts as stated in evidence the jury believe that the prisoner rested under a delusion that Mathews had attempted to kill his sister and did intend to kill her, and that from that delusion he was left without sufficient *reason, judgment and will*, to know that the offence was a crime against God and nature, they should acquit.

9. That although facts may have been proved which in the absence of insanity or unsoundness of mind, or the proof of it, might go to show malice in the prisoner, yet if the killing was done while insane, or resting under a delusion that was fixed in his mind, which left him without the use of his *reason, judgment and will*, at the *time* of the killing, the malice is not presumed, but the existence of it rebutted, and the jury should acquit.

10. That every other question is merged in the question whether or not the prisoner was insane at the time of the killing, and the only question for them to determine is, was he insane or of unsound mind with reference to the particular act in question, and at the time the offence is charged to have been committed, if so, he should be acquitted.

11. In order to constitute a crime, a man must have intelligence and capacity enough to have a criminal intent and purpose, and if his rea-

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son and mental powers are either so deficient that he has no will, no conscience, no controlling mental power, or if through the overwhelming violence of mental disease his intellectual power is for the time obliterated, he is not a responsible moral agent and is not punishable for criminal acts.

12. That if the jury believe from the facts and circumstances testified to by the witnesses, that the defendant was of unsound mind previous to the killing of Mathews and up to the time when the act was done, and that unsoundness of mind was such as to fix a delusion upon the mind of the defendant upon the subject of violence to his sister, which left him incapable of judging between right and wrong with reference to that subject, he should be acquitted.

13. That in forming a conclusion as to the guilt or innocence of the defendant, the jury should consider the state and condition of the prisoner's mind prior and subsequent to the killing, and if from all the evidence in the cause, they believe him of unsound mind at the time the act was done, they should acquit.

14. That the evidence of physicians examined as experts, is competent evidence to assist them in forming correct opinions of what unsoundness of mind is, and what the state of the prisoner's mind now is.

15. That if the jury have a reasonable doubt resting on their minds of the guilt of the defendant, they should acquit.

16. That the jury have the power to find the defendant guilty of a less offence than the one charged in the indictment, if from the evidence in the cause they believe him guilty of such less offence.

17. The rule of law is, that the whole of a confession must be taken together if introduced by the prosecutor, and it is entirely a question for the jury how far and to what extent the confessions of the prisoner are true.

All of which said instructions the court refused, except the last; to which refusal the defendant excepted.

Thereupon the court gave to the jury the following charge:

"Gentlemen of the jury. The evidence in this cause and the arguments of counsel on behalf both of the prisoner and the State having been now concluded, the weighty and most responsible duty is devolved upon you of saying upon your oaths, from the evidence before you, whether the defendant is or is not guilty of the crime of murder, with which he stands charged. To the commission of any crime there is necessary, not only the doing of an unlawful act, but the possession of

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adequate mental capacity to know that the act is wrong at the time of doing it, and the power of choosing between the commission of the act and its non-commission.

In accordance with this definition, the law of the present case may be considered under two branches.

1st. Whether the act charged in the indictment has been committed, as therein charged, and if so,

2d. Whether at the time of committing it, the defendant was capable of committing crime; in other words, what rules and principles of law ought to govern you in passing upon the defence set up in this case.

And here it may be proper to remark, that the statutes of this State do not permit the court to express an opinion upon the evidence given upon this trial, but only to place before you such legal rules and principles applicable to the case as ought to govern you in its decision. First, then, in regard to the commission of the act charged; it is exclusively your province, gentlemen of the jury, to say from all the evidence which has been given before you, whether the defendant did or did not commit the act charged in this indictment to have been done by him. The indictment charges the defendant *with murder in the first degree*, and if from the evidence you find that the defendant committed the act charged in the indictment, in manner and form as therein charged; that he committed it wilfully, deliberately, premeditatedly, and with malice aforethought, that is, without legal justification or excuse, and under circumstances showing wickedness and depravity of heart, you ought to find him guilty, unless you shall believe from the evidence that at the time of committing the act, the defendant was incapable of committing crime.

It is a rule of law, founded in reason, that the confessions of a defendant, when voluntarily made, are evidence against him, because common experience proves that a man will not, without motive for doing so, confess facts to his disadvantage, unless they are true; such confessions are always strengthened by circumstances corroborative of their truth. It is also a rule of law, that when the confessions of a defendant are given against him, the whole of what he says at the time of such confession, as well that which is in his favor as that which is against him, must be taken together as evidence of the facts stated; but it is the right of the jury to disbelieve and reject any portion of such statements, which the jury may believe either intrinsically improbable, or contradicted by other and more satisfactory evidence.

If, gentlemen, upon consideration of all the evidence given in the

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cause, you shall entertain a reasonable doubt of the commission of the act by the defendant as charged in the indictment, it will be your duty, gentlemen, without proceeding farther, to acquit the defendant. But if, from the evidence, you are satisfied beyond a reasonable doubt, that the act as charged in the indictment was committed by the defendant, it will then become necessary for you to proceed to the consideration of the defence here set up, to wit :

That at the time of the commission of the act, the defendant was, by reason of insanity, incapable of committing crime.

Before proceeding to lay down legal rules to aid you in the decision of this question, or rather the first legal rule which it is incumbent on the court to bring to your attention is that the law presumes every man who has arrived at the years of discretion, to be sane and capable of committing crime, until the contrary is shown ; so that the State, after proving the unlawful act, need offer no evidence whatever, of the sanity of the defendant, but may rest upon the legal presumption of sanity, until the defendant shows the contrary.

This defence is emphatically one which the defendant must make out, and it must be made out to the satisfaction of your minds. For if the evidence merely shows a case of doubt where the defendant might or might not be insane, this is not sufficient to authorize an acquittal. I repeat, if the evidence shows merely that the defendant might have been insane, at the time of the commission of the act, but does not show satisfactorily to your minds that he *was* insane at that time, this is not sufficient to warrant an acquittal.

Another point to which I think it necessary to call your attention, gentlemen, is, that in order to constitute a defence to this charge, insanity must not only be proved to have once existed, but it must be shown to have existed at the time of the commission of the unlawful act.

The question, therefore, for your decision, is not as to the mental condition of the prisoner, at the present time. This is entirely immaterial, except so far as it may have a tendency to show in connection with other evidence, that he was insane at the time of committing the act. I say, in connection with other evidence, for even the most positive and conclusive proof of the defendant's present insanity would be insufficient to warrant his acquittal, without evidence of his insanity at the time of committing the act. For it by no means follows that because a man is found to be insane at one time, that therefore he has always been insane, or that therefore he was insane at any prior point of

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time. But if you find from the evidence that the defendant was insane at any time prior to that of the alleged commission of the act of homicide, the law in such case presumes the continuance of that insanity, until a lucid interval or a restoration to reason is shown. But if you find from the evidence that after the occurrence of the insanity and before the commission of the act charged, a lucid interval did take place, then no presumption of the existence of insanity, at the time of the act, can arise from the proof of such former insanity.

In regard to the degree of insanity necessary to exempt an individual from responsibility for criminal acts, the law is that his mind must have been so far impaired or destroyed, that he was unconscious at the time of committing the act, that it was wrong, and that he ought not to do it, or he must have been so irresistibly impelled to the commission of the act, by insane impulse ; that he had not the ability to resist that impulse ; to control his actions and choose between right and wrong. I repeat, therefore, if you find from the evidence that the defendant committed the act charged, the question for you to determine is, whether at that time he was capable of knowing that the act which he was committing was an offence against the laws of God and man, and had at that time the power of choosing between good and evil, in reference to that act. If though laboring under hallucination or partial insanity, his mind was not so far clouded or destroyed as not to know the act was wrong, he cannot be excused for the commission of the act.

In determining this question, gentlemen, you ought carefully to consider and review all the facts and circumstances given in evidence, to ascertain whether, at the time of committing the act, the defendant evinced a knowledge or consciousness that he was doing or about to do a wrong and criminal act.

When monomania or partial insanity is set up as a defence to the charge of crime, in order to constitute such defence, it is necessary that the subject of insanity should lead to the fatal act ; in other words, there must be a connection between the crime and the insanity, so that but for the existence of that insanity, the crime would not have been committed. In the present case you ought first to consider whether the defendant was really under the insane delusion that the deceased Mathews had abused and ill-treated his sister, or whether this statement was merely a falsehood invented by him after the act, as an excuse for it.

To make this an *insane delusion*, it must have had no existence in fact, the defendant must have believed it true, and have been led to that belief under the influence of insanity and without any such reason

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or cause for believing it, as would have influenced a sane man; for if the fact had existence and the defendant knowing it took the life of Mathews, for that reason, this would be evidence of a killing with malice and not from insanity.

In the second place you ought to consider whether, supposing such insane delusion to have existed, the defendant was under the still further insane delusion, *that for those supposed injuries and indignities to his sister, he had the right to take the life of Mathews;* in other words, that to take the life of Mathews in revenge for such injuries, was not against the laws of God or man, but was right and proper. For you will perceive, gentlemen, that the imaginary existence of these facts, under the influence of insane delusion, could furnish no farther justification or excuse for the act, than the real existence of those facts would have done; so that unless the defendant was by his insanity on this subject, deprived of the mental power of drawing the proper conclusions in regard to these facts, in other words, deprived by his insanity of the power of knowing that these facts did not authorize the taking of life, his delusion upon the subject of these injuries can form no excuse for his act.

The fact that some or all of a person's ancestors have been insane, does not of itself prove that person insane, but where there is some direct evidence of insanity it serves to increase the probability of insanity.

The opinions of medical men, gentlemen, should have weight with you only so far as their means of knowledge and correct information upon the facts testified to, show them deserving of it.

In conclusion, gentlemen, if you are satisfied from the evidence beyond a reasonable doubt, that the defendant committed the act charged upon him in the indictment, and in the manner and form therein set forth and charged, and if it has been shown to the satisfaction of your minds that at the time of committing the act, he was so far deprived of reason as not to know that the act which he was committing was wrong, and was not so far deprived of will as not to possess the power of choosing between right and wrong in regard to this act, you ought in such case to find him guilty of *murder in the first degree.*

But if, on the other hand, from the evidence you have a reasonable doubt of the commission of the act as charged; or, if your minds are satisfied from the evidence, that at the time of the alleged commission of the act of homicide, the defendant had not the possession of reason sufficient to know that the act was wrong, or impelled by insane impulse

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had not the power of restraining from the commission of the act, you ought in any one of the cases last mentioned to acquit."

To the giving of which the defendant's counsel excepted.

The charge given by the court to the jury is comprehensive enough to cover the whole case, and we do not perceive any legal objection to it. It embraces most of the principles contained in the instructions asked for by the defendant's counsel; those not embraced in it are either wrong in principle or have no particular application to the case under consideration; therefore we see no error on this point.

After the jury had been charged by the court and retired to their room to consider of their verdict, they returned into court and made the following inquiry of the judge :

"The jury wish to know, whether they can find the prisoner guilty, in any other degree, than that charged in the indictment for murder in the first degree." The court replied : "Not if you find from the evidence, that the defendant committed the act charged upon him in the indictment, and committed it wilfully, deliberately, premeditately, and with malice aforethought, and in all other respects, in manner and form as charged in the indictment; and that at the time of so committing the said act, he knew that it was wrong and that he ought not to do it, and at the same time had the power of will to choose between its commission and its non-commission."

It is insisted that the court committed error in not informing the jury, that they had a right, under the law of the land, to find the defendant guilty of murder in the second degree or of manslaughter. We entertain a different opinion, and think that the court very properly responded to the inquiry of the jury. The defendant stood charged with murder in the first degree, he impliedly admitted the taking of the life of the deceased and placed his defence upon the fact, that, at the time he committed the act, he was incapable of crime by reason of being insane. This defence he was bound to make manifest to the jury, otherwise, the crime with which he stood charged, remained confessed, without any palliating or extenuating circumstances to reduce it to an inferior degree of crime. The jury had therefore no legal discretion; they were bound either to convict the defendant of murder in the first degree, because he had not established the truth of his defence; or, having proved to the satisfaction of the jury, that he was insane at the time of doing the deed they should have acquitted him of all crime. It is not like a case where a defendant is charged in an indictment with

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murder in the first degree, whilst the evidence proves the killing to have been done under circumstances which makes the offence only manslaughter; in which case, the jury may find a verdict for manslaughter. Our statute divides murder into two degrees—first, when committed by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or other felony; and second, all other kinds of murder at common law, not declared by statute to be manslaughter or justifiable or excusable homicide. The evidence on the part of the state, consisting mainly of the confessions of the defendant, voluntarily made, make out a case coming within the first degree of murder, and although the duty is a disagreeable one to find an individual guilty of the crime of murder in the first degree, the penalty of which is a forfeiture of life, yet the jury were bound under their oath, so to find in the case, unless they were satisfied from the evidence, that the defendant was insane at the time he committed the act. If the truth of the defence made was thus established the defendant was entitled, upon the principles of law, and not through the clemency of the jury to an absolute acquittal. It is a case in which there is no middle ground to occupy, no legal compromise to make, no discretion vested in the jury; they must either find the defendant guilty as charged and confessed, or acquit him on the ground, that by reason of insanity he is irresponsible to the laws.

There is only one other question which we deem it necessary to notice, and which was raised on the examination of the evidence. The father of the defendant being under examination, testified as to the state of the defendant's health for sometime prior to the commission of the act charged; also as to his conduct and other circumstances tending to show that at different periods he was not in his proper mind; when the defendant's counsel asked the witness the following questions:

1st. Was his mind affected by his dreams and other sights which he saw in his dreams?

2d. From all that you have seen and known of the defendant, what is your opinion as to whether he was or was not insane at the time he left your house for Arkansas.

3d. From the acts and conduct of the prisoner for two years previous to his going to Arkansas, was he an insane person?

Ans.—His conduct was such as to induce my particular and special

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attention—it was because I did not know but that he was going distracted.

These questions and answers were objected to by the prosecuting attorney, and the objections sustained by the court. To the action of the court, on this point, the defendant excepted, and also assigns it for error.

The principle involved in the above exception, has been examined by the appellate court of North Carolina, in the case of Clary's adm'r vs. Clary 2 N. C. Rep. 78, wherein it was attempted to set aside a will, because of the insanity of the testator, at the time of its execution; and the opinion of a witness was asked as to the state of the testator's mind at the time of making the will. The opinion of the court is so comprehensive and conclusive and meets our views of the law so fully, that we shall adopt that part of the opinion which discusses this question.

The court say : It is certainly the general rule that witnesses shall be examined as to facts, whereof they have personal knowledge, and not as to those, in regard to which they have no personal knowledge, but have only formed an opinion or belief. But this rule necessarily admits of exceptions. There are facts, which from their nature exclude all direct positive proof, because they are imperceptible by the senses, and of these no proof can be had except such as is mediate or indirect. No man can testify, as of a fact within his knowledge, to the sanity or insanity of another. Such a question, when it arises, must be determined by other than direct proof. The precise enquiry then is, must the evidence be restricted to the proof of other facts, coming within the knowledge of the witnesses. And from which the jury may draw an inference of sanity or insanity—or may the judgment and belief of the witnesses, founded on opportunities of personal observation, be also laid before the jury, to aid them in forming a correct conclusion. We understand, that this is a matter, on which different judges have ruled differently on the circuits, and it is important that a uniform rule should be settled in regard to it. The point was not determined in Crowell vs. Kirk 3 Dev. 355 ; nor are we aware of any *direct* and authoritative decision, which supercedes the necessity of recurring to general principles and legal analogies to ascertain what is right.

In the first place, it seems to us that the restriction of the evidence to a simple narrative of the facts, having or supposed to have a bearing on the question of capacity, would, if practicable, shut out the ordinary means of obtaining truth; and, if freed from this objection, cannot in

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practice be effectually enforced. The sanity or insanity of an individual may be a matter notorious and without doubt in a neighborhood, and yet few, if any, of the neighbors may be able to lay before the jury distinct facts, that would enable them to pronounce a decision thereon, with reasonable assurance of its truth. If the witness may be permitted to state, that he has known the individual for many years; has repeatedly conversed with him, and heard others converse with him; that the witness had noticed in these conversations that he was incoherent and silly; that in his habits he was occasionally highly pleased and greatly vexed without a cause; and that in his conduct he was wild, irrational, extravagant and crazy; what would this be but to declare the judgment or opinion of the witness of what is incoherent or foolish in conversation; what reasonable cause of pleasure or resentment, and what the indicia of sound or disordered intellect? If he may not so testify, but must give the supposed silly or incoherent language, state the degrees and all the accompanying circumstances of highly excited emotion, and specifically set forth the freaks or acts, regarded as irrational, and this without the least intimation of any opinion, which he has formed of their character—where are such witnesses to be found? Can it be supposed, that those not having a special interest in the subject shall have so charged their memories with those matters, as distinct independent facts, as to be able to present them in their entirety and simplicity to the jury? Or if such a witness be found, can he conceal from the jury the impression, which has been made upon his own mind; and when this is collected, can it be doubted, but that his judgment has been influenced by many, very many, circumstances, which he has not communicated, which he cannot communicate, and of which he is himself not aware?

We also think there is an analogy in the investigation of questions of this kind and in the investigation of other questions, wherein positive and direct evidence is unattainable, and in which the rule of evidence is well established. Of this kind are questions of personal identity and hand-writing. Mere opinion as such is not admissible. But where it is shown that the witness has had an opportunity of observing the *character* of the person or the hand-writing, which is sought to be identified, then his judgment or belief, *framed upon such observation*, in evidence for the consideration of the jury; and it is for them to give to this evidence that weight, which the intelligence of the witness, his means of observation and all the other circumstances attending his tes-

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tinony, may in their judgment deserve. And why is this, but because it is impossible for the witness to specify and detail to the jury all the minute circumstances, by which his own judgment was determined, so as to enable them by inference from these to form their judgment thereon. And so it is in questions respecting the *temper*, in which words have been spoken or acts done. Were they said kindly or rudely, in good humor or in anger, in a jest or in earnest? What answer can be given to these enquiries, if the observer is not permitted to state his impression or belief? Must a *fac similie* be attempted, so as to bring before the jury the very tone, look, gestures and manner, and let them collect thereupon the disposition of the speaker or agent? It is a well known exception to the general rule requiring witnesses to testify facts and not opinions, that in matters involving questions of science, art, trade or the like, persons of skill may speak not only to facts, but give their opinions in evidence. It is insisted that by the terms of this exception, persons not claiming to possess peculiar skill, and all persons upon matters not requiring peculiar skill are excluded from giving opinions. Professional men are allowed to testify to the principles and rules of the science, art or employment in which they are especially skilled, as general practical truths or *facts* ascertained by long study and experience; and also may pronounce their opinion as to the application of these general facts to the special circumstances of the matters under investigation. Whether these circumstances have fallen under their own observation or have been given in evidence by others. The jury being drawn from the body of their fellow-citizens are presumed to have the intelligence, which belongs to men of good sense, but are not supposed to possess professional skill, and, therefore in matters requiring the exercise of this skill, are permitted to obtain what is needed from those who have it, and who are sworn to communicate it fairly. Thus, ship-masters have been allowed to state their opinions on the seaworthiness of a ship from a survey taken by others; physicians to pronounce upon a wound which they have not seen; and painters and statuaries to give their opinion whether a painting or statue be an original or copy, although they have no knowledge by whom it was made. This is mere opinion, although the opinion of skilful men. Thus none but professional men are permitted to give in matters involving peculiar skill, and none whatever are allowed to give in matters not thus involving skill; because with this exception, the jury are equally competent to form an opinion as the witness, and, with this exception, their judgment

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ought to be founded on their own unbiased opinion. But judgment founded on actual observation of the capacity, disposition, temper, character, peculiarities of habit, form, features or hand-writing of others, is more than mere opinion. It approaches to knowledge, and is *knowledge*, so far as the imperfection of human nature will permit knowledge of these things to be acquired and the result thus acquired should be communicated to the jury, because they have not the opportunities of personal observation, and because in no other way can they effectually have the benefit of the knowledge gained by the observation of others.

Before a witness should be received to testify as to the condition of mind, it should appear that he had an adequate opportunity of observing and judging of capacity.

But so different are the powers and habits of observation in different persons, that no general rule can be laid down as to what shall be deemed a sufficient opportunity of observation, other than that it has in fact enabled the observer to form a belief or judgment thereupon; and the weight of his opinion must depend upon a consideration of all the circumstances, under which it was formed.

For the foregoing reasons we are of opinion that the criminal court committed error in excluding the question and answer of the defendant's father from the consideration of the jury, and that for this reason, the verdict should have been set aside, and a new trial awarded. The judgment of the criminal court is reversed, the verdict set aside and a new trial granted the defendant.

The cause is remanded to the criminal court.

*Joint-trial
O.S.J.*

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1. The effect of a confirmation by the board of commissioners for the adjustment of land titles in the territory of Louisiana under the act of congress of March 3, 1807; is to vest the legal title in the claimant or his legal representatives.

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2. The Spanish law of abandonment was in force in the territory until the year 1816. Abandonment is a question of fact depending upon the intention of the party at the time of relinquishing possession.
3. The territorial act of Limitations of 17th Dec. 1816 abolished all prescription.
4. When the statute of limitations begins to run no subsequent disability will stop it.
5. In a contest between two aliens under the same alienor, one of them is not estopped from showing an outstanding title adverse to that of his grantor.
6. By the territorial law unconfirmed land titles were subject to sale under execution.
7. The fact that a part of the description set forth in an advertisement for the sale of land under execution is false, will not vitiate the sale if the premises are otherwise certainly described.
8. The title of a *bona fide* purchaser at a sheriff's sale cannot be declared void in a collateral proceeding, on account of any error or irregularity in the judgment or execution.
9. Prior to 1826, the sale of the lands of deceased persons was authorized under executions against their personal representatives.
10. An action of ejectment may be maintained on a confirmation by the board of commissioners for the adjustment of land titles.

ERROR TO ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

This was an action of ejectment brought by the plaintiff in error to recover a lot in the city of St. Louis, fronting about 40 feet on Washington Avenue, between 4th and 5th streets. The plaintiff claimed under one Jacques Clamorgan who died in St. Louis in the year 1814, and to whom there was confirmed on the 13th November 1811, by the board of commissioners for the adjustment of land titles in this territory, under the second section of the act of 3d March 1807, a tract of one by forty arpens situated in the little prairie adjoining the town of St. Louis. The minutes of the board read in evidence by the plaintiffs, recite that Jacques Clamorgan assignee of Ester mulattress, assignee of Joseph Brazeau, assignee of Gabriel Dodier, claiming one by forty arpens situated in the little prairie adjoining the town of St. Louis, produced a concession from St. Ange and Piernas L. G., dated 23d May 1772, a transfer from Gabriel Dodier and Joseph Brazeau to Esther dated 4th Nov. 1793 and from Esther to claimant dated 2d Sept. 1794. The board grant to Jacques Clamorgan forty arpens of land under the provisions of the 2d sec. of the act of congress entitled an act respecting claims to land and passed 3d March 1807 and order that the same be surveyed conformably to metes and bounds contained in the report of a survey made for said Dodier and found in Livre Terrien No. 2 folio 15, survey at the expense of United States. The survey under this confirmation was made in 1826 and is numbered 1278, but it was admitted on the trial that this survey had been returned to the surveyor general's office soon after it was made and had there remained on file, but was not approved by the surveyor general, until the year 1845, shortly before a patent issued, when it was for the first time approved. The plaintiff first read in evidence a patent from the United States issued in the year 1845. Shortly before the commencement of this suit to Jacques Clamorgan or his legal representatives for the tract of one by forty arpens, and then proved that the patent embraced the premises described in the declaration, and that the defendant was in possession of the lot in question at the commencement of the suit, and also the monthly value thereof. The plaintiffs then read in evidence a certified copy of the will of Jacques Clamorgan, by which he devised his whole estate, after payment of several small specified legacies, to his four natural children St. Eutrope, Apoline,

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Cyprian and Maximin. The whole to be divided into five equal parts, of which Maximin was to have two parts and each of the others one part. They then read in evidence a certified copy of the last will of Cyprian (who died in 1827) with the probate thereof, by which after several specified devises, none of which embraced the premises in dispute, he devised to his sister Apoline and to her three natural children, Henry, Louis and Louisa, and to the survivors of them as tenants in common, all the interest and estate which the testator had or was entitled to in any lands in the state of Missouri. They then read in evidence a certified copy of the last will and testament of the said Apoline with the probate thereof, by which after some specific devises, not embracing the premises in dispute, she devised to her three children, Henry, Louis, and Louisa, and to any and all other children that might thereafter be born to her, and to the survivors of them, all the interest and estate which the testatrix had or was entitled to in law or equity in any lands or lots lying and being in the state of Missouri. The plaintiffs then read in evidence a deed from the two plaintiffs, Louis and Henry Clamorgan and their wives to their two co-plaintiffs Landes and Sharp, for three undivided fourth parts of all the right, title and interest of the said Henry and Louis in and to the tract of one by forty arpens embraced in the patent. The plaintiffs then proved that Cyprian died in 1826 or '27—that Apoline died in 1829 or '30, leaving four children, Louis, Henry, Louisa and Cyprian. That Louisa died in 1833, aged only 6 or 8 years—that Louis Henry and Cyprian are yet living, and the two former are plaintiffs in this suit. That the said Apoline was never married—that Maximin died about the year 1820, unmarried and without children—that St. Eutrope died many years ago—as the witness supposed some 15 or 20—leaving a wife but no children. The plaintiffs then read in evidence a transcript from the office of U. S. recorder of land titles, purporting to contain a complete transcript of all that appeared of record in that office, relative to the claim of Jacques Clamorgan to the tract of one by forty arpens in dispute; this transcript contained the following documents:

1st. The survey by Duralde the then Governor of this tract and of the adjoining tracts, made in 1772. On the margin of the survey of this tract, is a memorandum signed Trudeau, representing Clamorgan as proprietor and stating that it was originally conceded to Julius Roy and afterwards reunited to the King's domain—then conceded to Gabriel Dodier who afterwards sold it to Clamorgan.

2d. A deed from Dodier to Esther for the tract of one by forty in dispute, dated 4th Nov. 1793, and recorded in recorder's office 29th Nov. 1805.

3d. A deed from Esther to Clamorgan for the same tract dated 2d Sept. 1794, and recorded 10th Dec. 1805.

4th. Clamorgan's claim before the board of commissioners for this tract with a survey and plat of the same accompanying the claim.

5th. The minutes of the board confirming this tract to Clamorgan 13th Nov. 1811.

6th. Certificate of confirmation issued by the board to Clamorgan for this tract 13th Nov. 1811.

7th. Patent Certificate issued by recorder Conway on the above confirmation, 10th Febrary 1845.

The plaintiffs then read in evidence a certified copy of the survey No. 1278, made in 1824, of the tract in question under the confirmation, and proved by the late U. S. recorder of land titles at St. Louis—that the record books A B C D E and F in said office contain the notices and claims to land filed before the commissioners for the adjustment of land titles—that a number of the original notices filed by claimants are yet in the office, but that a large majority of them after being filed and recorded, were withdrawn; whilst the witness held that office, he generally took receipts for them. Has never examined for the original notice of the claim to the tract in controversy. Upon this proof the plaintiffs rested their case; the defendant then introduced the following documents.

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1st. The transcript of a record of a suit commenced by Gregorie Sarpy ex'r of Antoine Reilhe dec'd against Jacques Clamorgan, in the general court for the territory of Louisiana in May 1808. The transcript contained 1st, the declaration; 2d, the summons, which had no endorsement showing that it was ever delivered to the sheriff or was ever executed; 3d, the judgment which recites as follows, "and now at this day come the parties aforesaid by their attorneys and neither party requiring a jury, but this case with all things relating to the same being submitted to the court for that it appears to the court," &c., proceeding to render judgment against the defendant for \$2393 80 and costs, and lastly an execution on this judgment which was returned with only this endorsement upon it, "Received 6th June 1808, satisfied Jer. Conner, sheriff"

2d. A deed from sheriff Conner to Alex. McNair for a tract of one by forty arpens reciting the foregoing execution and that by virtue thereof, the said sheriff did attach all the title of said Clamorgan to a certain piece or parcel of land being one arpen in front, by the depth of forty arpens, situate in the little prairie and adjoining the town of St. Louis and that having advertised the same according to law, he sold the same to said McNair for \$180. This deed was dated 8th July 1808, was acknowledged by the sheriff in the court of common pleas for St. Louis district on 9th July 1808 but was not recorded until 13th Oct.

3d. A deed from Alex. McNair to Jeremiah Conner dated 13th day of August 1808 for several tracts of land and amongst others, a tract described as "One arpen by forty, late the property of one Jacques Clamorgan purchased by said McNair at a public or sheriff's sale of the property of said Clamorgan, as by deed bearing date the 8th day of July last." This deed was recorded 21st Feb. 1809.

4th. A transcript of a judgment and proceedings under it in favor of Rufus Easton vs. Soulard & Cabanne ex'rs of Jacques Clamorgan. The suit was an action of debt, commenced by Easton in the circuit court for St. Louis county against the defendants as executors of Clamorgan on the 17th Nov. 1819. The summons was served on the defendants, who pleaded to the action and on 20th April 1820 judgment was rendered for the plaintiff for \$131, debt \$28 87 damages, besides costs, and that he have his execution against all and singular the goods and chattels, lands and tenements which were of the said Clamorgan at the time of his death in the hands of said executors, to be administered, upon this judgment an execution issued on the 10th June 1820, upon which the sheriff returned that he had made \$169 by the sale of a tract of land of 80 arpens, which after paying all the costs and interest left \$143 02 to be credited to the debt and damages. On the 3d April 1826 an alias si fa issued on the judgment, which directs the sheriff that of the goods and chattels, lands and tenements which were of the said Clamorgan at the time of his death in the hands of said executors to be administered, he should cause to be made &c., following the language of the judgment upon which the sheriff returned that to satisfy said execution, he had levied upon the real estate described in his advertisement of sale, a copy of which is appended to and forms a part of his return, and that after duly advertising the same he sold it on 27th July 1826, to John O'Fallon and Jesse D. Lindell, for \$33, which sum, after deducting all costs, satisfied the execution and left a surplus in his hands of \$5 42. The advertisement accompanying the return describes the land levied upon as a "a certain piece or parcel of land containing one arpen in front by forty arpens in depth, and bounded on the eastern end by a fence formerly made to defend the crops of the inhabitants of St. Louis against the animals or beasts. On the north by the land of Taylor; (pere) on the western end by the King's domain, or vacant land, and on the south by the highway which leads to the village of St. Charles, it being the same lot of forty arpens acquired by said Clamorgan of Gabriel Dodier, by deed bearing date November 4th, 1793, the boundaries above set forth are the same as given in said deed."

5th. A deed from sheriff Walker to O'Fallon and Lindell, describing the land as it is described in the sheriff's advertisement. This deed was dated 10th August 1826, and was duly acknowledged and recorded.

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6th. A certificate from the keeper of the parish records of the Catholic church at St. Louis, showing that St. Eutrope was the natural son of Jacques Clamorgan, and a free negress named Helen; and that he was born on 10th April, 1799; that Apoline was also a natural child of said Clamorgan, and a negress named Susan, and that she was born 7th February, 1803; that Cyprian was also a natural child of said Clamorgan, and a negress named Judith, and was born 6th June 1803, and that Maximin was a natural child of said Clamorgan, and was free born, the child of Julia, a mulattress, and was baptized 13th July 1807.

7th. A deed from Joseph Brazean to Eutrope, Apoline and Cyprian, three of the children of Clamorgan, for other property than that in controversy, upon which deed was an endorsement proved to be in the hand writing of Clamorgan, in which he recognizes St. Eutrope, Apoline, Cyprian, and Maximin to be his natural children, and gives the dates of their respective births as above set forth, and enjoins it upon three others to permit Maximin to share the property with them.

8th. A deed from Gabriel Dodier to Esther, mulattress for the tract of 1 X 40 arpens, dated 4th November, 1793, in which deed it is described as a lot of one arpen in front by forty in depth, situated in the rear of this town on the prairie which lies there, bounded on the east by the fence which is placed there to preserve the grain from animals; on the west by the King's domain; on the north by a lot formerly appertaining to Mr. Tayon Sr., on the south by the royal road which leads to the village of St. Charles and St. Ferdinand; which road separates the aforesaid land from that which Mr. Masie actually cultivated, which has been acquired from Mr. Francis Bisonet, as appears from the book of Arpentage, for the year 1772, the which aforesaid lot of one arpen has been heretofore sold by the said Gabriel Dodier to Mr. Calver, Sr., and by this last to Mr. Jos. Brazean, who has finally again sold it to the above named Esther, a free mulatto woman who is actually in possession, &c., Brazean and Dodier unite in the deed.

9th. A transfer from Esther on the back of the last mentioned deed of all her right, title and interest in the said tract to Wm. C. Carr, dated 15th June, 1809, the deed last mentioned was duly recorded about the time it bears date.

10th. A transfer or assignment on the back of the same deed from Wm. C. Carr and wife to Jeremiah Conner of all the intestate of said Carr and wife to the said tract, dated 28th April, 1812, and recorded in 1814.

11th. Mesne conveyances from Jeremiah Conner through several intermediate purchasers of the lot for which this suit is brought, down to Joseph Bates, under whose heirs the defendant at the time of the institution of this suit was in possession as a tenant.

12th. A document which was proved to be in the handwriting of Jacque Clamorgan, as also several endorsements thereon which document purported to be a list of lands belonging to Clamorgan at the time it was made, and was endorsed by him "lands which remain to me," in which the tract of 1 X 40 arpens does not appear.

13th. A deed from Jacques Clamorgan to Wm. C. Carr, dated 4th Sept., 1813, for a portion of the lands mentioned in the list or memorandum last above mentioned, and which are marked with letters and figures corresponding with the same tracts on the said list.

14th. An original plat and certificate of survey of the tract of 1 X 40 arpens in dispute, made by Soulard, in the year 1805, with several endorsements thereon, which were proved to be in the handwriting of Clamorgan; one of which was the following: "Sold at auction." There was also endorsed on said plat the word "ascertained," which was proved to be in the handwriting of Garnier, clerk to the board of commissioners, and the words "recorded Book C, pages 165 & 166," which was in the handwriting of one of the clerks of Donaldson, the former recorder of land titles.

Defendant then proved by Wm. C. Carr, that in 1804, Clamorgan resided in St. Louis, on the same block on which the Missouri Hotel now stands, and continued to reside there until his death. That from 1804 until after witness bought it in 1809, the tract of 1 X 40 in dispute remained

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unoccupied. That in 1804 the common field fence was all gone and none of the common field lots were then enclosed. That witness bought the 1, X 40 arpens in dispute of Esther, in 1809, and took possession of it the same year or the year following, by building a fence on the eastern end of it, enclosing an acre or two. The fence enclosed the width of the arpen and went down to where Third street now is. Clamorgan then resided on Main street, about one and a half blocks north of the fence aforesaid. Clamorgan was in town, and at his place when witness made the fence and took possession, and he and witness had a good deal of conversation about it before witness took possession, but had no conversation until after witness bought of Esther. Clamorgan did not object to witness' taking possession. Witness told him he had bought it of Esther; and intended to take possession under his purchase, and accordingly took possession in his own right, under Esther. Witness told Clamorgan that he was going to fence in a lot to put his horse in, and if he had any objection or any claim to set up he had better do it then. Clamorgan replied toot! toot! take it. I will never disturb you, or something to that effect. Witness then knew of the deed from Esther to Clamorgan for the same tract. Had seen it before he purchased of Esther. Witness knew Esther, who was a mulattress, and at that time free, having been manumitted by Clamorgan. Witness never took possession of any part of the tract otherwise than as above stated, but kept the possession until he sold to Conner in 1812. Conner then took possession and extended the fence westward about to where Seventh street is. The arpen of Francis Prissonet adjoins this on the south. Conner kept his horse and cow in the enclosure, and kept up his enclosure some years; can't say how many. Conner died between 1820 and 1823. Lucas and Christy enclosed their lots in 1807 or 1808. Christy's fence extended from Third street westward to Seventh street. Knows that Conner exercised acts of ownership over the land in dispute for some years after he bought it, and thinks he continued to do so until his death. Conner in his lifetime laid off blocks and streets upon the ground. Clamorgan had been a merchant and trader here, and went to Santa Fe; witness thinks in latter part of 1809, but not positive as to time, and was gone a year or two. The witness also proved other conversations with Clamorgan tending to show that Clamorgan had fraudulently procured deeds from Esther for sundry tracts of land and amongst others the land in dispute. That Esther had conveyed some of these lands to witness and witness afterwards sold and conveyed a part of them (not the land in controversy) back to Clamorgan. Witness was not the agent of Esther to procure confirmations to her lands, and could not have been as he was then U.S. attorney, having been appointed such in 1805 and continued such until the board was dissolved in 1811. Witness never presented this claim for confirmation, nor any that he got from Esther, but presumes they were presented in the name of Clamorgan and that he witness knew that part. Esther was reputed to be Clamorgan's concubine. Witness thinks before he took the deed from Esther, he had seen her deed to Clamorgan of record, in 1813 witness and Gov. Clark purchased a large quantity of land of Clamorgan; does not recollect of any unsatisfied judgment at that time against Clamorgan; thinks if there had been he would have known it.

The defendant also introduced other evidence tending to show that Conner from the time of his purchase of Carr, took possession of the eastern end of the tract, extended the enclosure made by Carr, out westward near to where Seventh street now is, which enclosure continued until Conner concluded to lay off the eastern end of the tract into town lots, which was about 1818, or 1819. That about this time he took down the fence, laid off the ground into lots and blocks, laid out Washington Avenue, a street running along the south edge of the tract designating the blocks by stakes or stones. That about the same time, &c., sold several lots which were soon after enclosed and occupied and have ever since been in the possession of those claiming under him. That up to the time of his death he claimed to own such parts of the tract as he had not sold. It was also proved that in 1812 Conner had offered to take \$800 for the tract in dispute, but that it afterwards rose rapidly in value, and about 1812 Conner was offered \$80,000 for it by some one from Cincinnati, but refused it.

This rise was at its hight in 1820, after which property depreciated as rapidly as it had risen,

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and for several years there were great sacrifices of property. Large quantities sold at forced sales, and as there was very little money in the country, it generally went greatly below its value. In 1826 it had begun to improve again, and property was looking up.

One witness (Wash) thinks that in 1826, if the title to this 1 X 40 arpens had been free from dispute it would have sold for at least \$10,000. But thinks that Clamorgan's title to it would have brought little or nothing.

The defendant also introduced evidence tending to prove that the common field fence which bounded the tract in dispute on the eastern end, was taken down before the change of government. That whilst this fence was standing there was a gate in it about opposite the centre of what is now Washington Avenue, through which passed a road leading to St. Charles, and that was the road usually traveled. That this road ran along the south edge of the tract in dispute until it reached about opposite or a little beyond where the college now is, and then diverged to the right and crossed over in the direction of judge Carr's—this was called King's road, as were all large public roads. It was also proved that Clamorgan left here prior to 1808, on a trading expedition to Santa Fe and was absent two or three years. Did not return until the winter of 1808 or the spring of 1809.

Pierre Chouteau Jr., testified that whilst Clamorgan was absent at Santa Fe, Peter Chouteau, Sr., the father of witness, purchased a judgment in favor of Mildrum and Parks vs. Clamorgan, to prevent a sacrifice of Clamorgan's property—that after purchasing the judgment, he caused a large quantity of Clamorgan's lands to be sold under it and purchased them in and after Clamorgan's return. The said Peter Chouteau, Sr., permitted him to redeem them from time to time as he could command the means.

The defendant then read eight documents, deeds, surveys, &c., of lands, all marked and numbered in Clamorgan's handwriting, and relating to lands mentioned in his memorandum or list of lands given in evidence by defendant, and tending to support the same as an authentic record of the real property of Clamorgan some time before his death, and of his disposition of the same. The defendant then read seven deeds from Conner to Cisgrave and others, conveying to them severally certain lots, some of which were on the 1 X 40 arpens in dispute, and others on the tract next adjoining it on the south, which was also claimed by Conner. These deeds bear date from 1820 to 1823. Also a certificate from the keeper of the parish register, showing that Conner was buried on the 20th day of Sept., 1823.

The plaintiff then read in evidence three deeds of emancipation from Clamorgan to his four children, St. Eutrope, Apoline, Cyprian and Maximin, which was proved to be in the handwriting of Clamorgan, and bears date 16th Sept., 1809. Also certificates from the keeper of the parish records of the catholic church at St. Louis, showing that Louis Clamorgan, one of the plaintiffs, was born on 25th July, 1820. That Henry Clamorgan, another of the plaintiffs was born on the 8th day of July, 1822, and that Cyprian, son of Apoline, was born on 27th April, 1830.

Plaintiffs then introduced evidence tending to prove that upon a diligent examination of the Spanish archives, and of the records of St. Louis, no deed could be found of record from Gabriel Dodier to Jacque Clamorgan nor any reference to such a deed.

The plaintiff then moved the court for the following instructions to the jury, which were given,

1st. The Spanish law of prescription as affecting lands, did not exist in the Missouri territory after the taking effect of the act of the general assembly of the territory of Missouri, on the 17th day of December, 1818, entitled an act for the limitation of actions to be brought for the inheritance or possession of real property.

2d. If the jury find from the evidence that the defendant and those under whom he claims had not ten years possession of the premises prior to the 17th Dec., 1818, then said defendant has no title by prescription,

3d. That the execution in favor of Rufus Easton against the executors of Jacques Clamorgan,

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dated the 3d day of April, 1826, and read in evidence by the defendant, and all the proceedings of the sheriff under and by virtue of the said execution, are null and void.

4th. If the jury find from the evidence that the boundaries described in the deed from John K. Walker, sheriff to O'Fallon and Lindell were not at the time of the sale the true boundaries of the lot intended to be described, and that the same had not been bounded in the manner therein described for a period of more than 20 years, and that the deed referred to in the said description, as the one from which it was taken had no existence in fact, then the said description is insufficient, and the deed void unless the jury find from the evidence that the land was generally known in the community at the date of said sale by the description given in said deed.

5th. That if the jury find from the evidence that the defendant claims title under John O'Fallon, and that said O'Fallon accepted a deed on the 10th day of May, 1826, intended to convey the title which Jacques Clamorgan had at the time of his sale in the lot in question, then the defendant cannot avail himself of the statute of limitations in bar of this action.

The plaintiff then moved for the following, which were refused :

1st. If the jury shall believe from the testimony that the patent read in evidence by the plaintiffs embraces the premises in the declaration mentioned, or any part thereof, and that the said patent was fairly obtained without fraud or covin, and further that Jacques Clamorgan, the patentee, had died before the patent issued, having first duly made and published his last will and testament in writing, by which he devised the said premises to his four children, St. Eutrope, Cyprian, Martial, Apoline and Maximin. That the said St. Eutrope and Maximin afterwards and in the lifetime of the said Cyprian, Martial and Apoline, died intestate and without issue : that afterwards and before the commencement of this suit, the said Cyprian Martial died, having first duly made and published his last will and testament in writing, by which he devised the said premises or any part thereof to the plaintiffs, Louis and Henry Clamorgan. That afterwards and before the commencement of this suit, the said Apoline died, having first duly made and published her last will and testament in writing, by which she devised the said premises or any part thereof to the said plaintiffs, Louis and Henry Clamorgan ; and that afterwards and before the commencement of this suit, the said Louis and Henry Clamorgan, by their deed in writing, proved and recorded according to law, conveyed an undivided portion of their interest in said premises to the plaintiffs, Landes and Sharp, then the legal title to such undivided portion of the said premises as is embraced in the said patent, and in the devises from the said Cyprian Martial and Apoline, to the said Louis and Henry, is in the plaintiffs.

2d. That if the patent read in evidence by the plaintiffs was fairly obtained, without fraud or covin, and embraces the premises in the declaration mentioned, or any part thereof, the legal effect of said patent was to vest the legal title to the premises therein mentioned, in Jacques Clamorgan, the patentee, if living at the date of the patent, and if not living then, in his heirs, devisees or assignees, in the same manner as if the patent had issued to said Jacques Clamorgan during life.

3d. That if the confirmation to Jacques Clamorgan, bearing date 13th November, 1811, and the survey made by virtue thereof, bearing date October 4th, 1826, embrace the premises in the declaration mentioned, or any part thereof, and if the patent read in evidence by the plaintiffs embrace the same premises, then the legal effect of the said confirmation, survey and patent, was to vest the legal title to said premises in the said Jacques Clamorgan, if living at the date of the patent, and if not living, then in his heirs, devisees or assignees.

4th. That prior to the confirmation read in evidence by the plaintiffs, the legal title to the premises embraced in said confirmation, was in the government of the United States, and that the confirmation, survey and patent, read in evidence by the plaintiffs, if obtained without fraud or covin, were effectual to vest the legal title to said premises in the said Jacques Clamorgan, his heirs, devisees, or assignees.

5th. That the defendant has shown in proof no valid title by prescription to the premises in dispute, either in Esther or any one claiming under her.

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6th. That the judgment read in evidence by the defendant in favor of ——— Sarpy for the use of Mildrum and Parks against Jacques Clamorgan, was null and void, and the sale made by the sheriff by virtue of the execution issued thereon, and the deed from said sheriff to Alex. McNair, is also null and void.

7th. That the deed from the sheriff to Alex. McNair, dated 8th July 1808, and read in evidence by the defendant, is void for uncertainty, and should be disregarded by the jury.

8th. That the deed from the sheriff to Alex. McNair, dated 8th July 1808, and read in evidence by defendant, is void as to plaintiffs Sharp and Landes, unless they had notice of said deed at the date of the deed from Louis and Henry Clamorgan to said Sharp and Landes, as read in evidence by the plaintiffs.

9th. That if prior to the conveyance from Esther to William C. Carr, the said Esther had conveyed the said premises to Jacques Clamorgan, and the said Carr had notice of that fact at the date of the conveyance from Esther to him; then the said Carr took the possession in bad faith, and by virtue of such possession acquired no title by prescription to the said premises.

10th. That if the said Jacques Clamorgan gave a notice in writing to the board of commissioners for the adjustment of land titles, as required by the acts of Congress of 2d March, 1805, and 3d March, 1807, of his claims to the premises in controversy, in that event during the pending of said claim before the said board, prescription did not run against him.

11th. That if before and at the time the said William C. Carr took possession of said premises, the said Jacques Clamorgan had delivered to the board of commissioners a notice in writing of his claim to said premises as required by the acts of Congress of 2d March 1805, and 3d March 1807; and if said claim was pending before said board at the time that Esther conveyed the said premises to said Carr, and if said Carr had notice of that fact, then he received the possession in bad faith, and such possession did not support his prescription.

12th. That if the said Carr, as the attorney for Mildrum and Parks, had obtained a judgment in their favor against Jacque Clamorgan, by virtue of an execution upon which judgment the premises in controversy had been levied upon and sold by the sheriff to Alex. McNair, and by virtue of said sale conveyed by said sheriff to said McNair, before the said premises were conveyed by Esther to said Carr; and if the said Carr had notice of these facts, then he acquired the possession in bad faith.

13th. That the sale made by John K. Walker, sheriff, to Jesse G. Lindell and John O'Fallon, on the 27th July 1826, and the deed made in pursuance of said sale, bearing date the 27th July 1826, as read in evidence by the defendant, are fraudulent and void.

14th. That if at the date of the levy and sale by sheriff Walker, and by virtue of the execution in favor of Rufus Easton, against Jacques Clamorgan's executors, dated 3d April 1826, of the premises levied upon, if the said premises, or a considerable portion thereof, then constituted a part of the city of St. Louis, and had been laid off into blocks and squares, separated by streets and alleys, and distinctly marked out by stones set up at the corners or other visible boundaries, and if some of said lots or blocks had before then been sold and conveyed by Jeremiah Conner, claiming to be the proprietor thereof, and if upon the said lots or blocks so sold as aforesaid, buildings and other improvements had before then been erected by the purchasers, then the said levy and sale made by sheriff Walker to John O'Fallon and Jesse G. Lindell, were null and void.

15th. That if the premises levied upon by sheriff Walker by virtue of the execution in favor of Rufus Easton, against Jacques Clamorgan's executors, dated 3d April 1826, and sold by said sheriff by virtue of said execution and levy to John O'Fallon and Jesse G. Lindell, on the 27th July 1826, for thirty-three dollars, were at the time of said levy and sale susceptible of division without injury to the property, and were at the date of said levy and sale worth at least ten thousand dollars, then the said sale is fraudulent and void in law.

16th. That if sheriff Walker, by virtue of the execution in favor of Rufus Easton, against Jacques Clamorgan's executors, dated 3d April 1826, levied upon the tract of land containing

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one arpen front by forty arpens in depth, of which the lot in controversy in this suit is a part, it was the duty of said sheriff in the said levy, or in his advertisement of the land for sale, to have described the same with reasonable certainty, and if he did not so describe it, either in the levy or advertisement, the said sale is void, and conferred no title on the purchasers.

17th. That if sheriff Walker, by virtue of said execution, dated 3d April 1826, in favor of Rufus Easton vs. Jacque Clamorgan's executors, levied upon only one tract of land containing one arpen in front by forty in depth, and in advertising the same for sale ; described the boundaries thereof in such manner that the boundaries given in said advertisement embraced two tracts, each having one arpen front by forty deep, thereby leaving it uncertain from his advertisement which of the two tracts he had levied upon : the sale made by said sheriff under said advertisement of either of said tracts is void in law.

18th. That if on the 17th day of December, 1818, Cyprian, Martial and Apoline Clamorgan, (the devisors of the plaintiffs Louis and Henry Clamorgan) were lawfully entitled to the possession of the premises in controversy, or any part thereof, and if the said Cyprian, Martial and Apoline were then under the ages of twenty-one years, they were allowed by law the period of twenty years, after they should respectively have become of the age of twenty-one years, within which to prosecute suit for the same ; and if within the said period of twenty years last above mentioned, the said Cyprian, Martial and Apoline died, having first duly published their last wills and testaments in writing, by which they respectively devised the premises in controversy to the plaintiffs Louis and Henry Clamorgan, and if at the time of the taking effect of the said devises, the said Louis and Henry were infants, under the age of twenty-one years, then during the minority of the said Louis and Henry the statute of limitation did not run against them.

19th. Previous to the date of the confirmation of to Jacques Clamorgan, on the 13th day of November, 1811, given in evidence by the plaintiffs, the legal title to the premises therein described, was in the governments of Spain, France, and the United States, and there could not have been legal prescription against either of said governments.

20th. The defendant in this suit cannot avail himself of any possession of the land described in the confirmation given in evidence by the plaintiffs as adverse to the sheriff's claim prior to the date of the deed from sheriff Walker to O'Fallon and Lindell, that is to say, prior to the 10th day of August 1826.

21st. The defendant in this action cannot avail himself of any possession of the premises in dispute as a bar to the plaintiffs recovering in this suit, except after the date of the deed from sheriff Walker to O'Fallon and Lindell, that is to say, after the 10th day of August 1826.

22d. No action could have been had or maintained by Clamorgan, nor by any person claiming under him for the recovery of the possession of the premises in question, prior to the survey and setting apart of the same, under the said confirmation by the United States surveyor in 1826, and until such survey, time did not run under the statute of limitations against those claiming under said confirmation, and can be calculated only from the time of such survey.

23d. No adverse possession prior to the statute of limitations in 1818, not having matured into a presumed grant, by reason of thirty years prior consecutive possession can avail after said statute against a right of action then existing.

24th. Clamorgan had no estate in the tract in controversy, at the time of the sheriff's sale of sheriff Conner, to McNair, which could be sold under an execution.

25th. The judgment in the suit of Sarpy against Clamorgan is void, if the jury believe from the evidence that Clamorgan was not served with process in said suit, nor authorized any appearance thereto for him, and this the defendant is bound to show, unless the record of the case shows a service.

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28th. Before the confirmation no right, title, or estate, in this tract existed out of the United States, saleable either at private or sheriff's sale, that could be enforced at law.

27th. To make a title by prescription, the possession must be begun with an honest and sincere belief of right to the property, the possession must be uninterrupted, and under a claim of title; a discovery by the person purchasing of any defect of title during the running of the time necessary for making a title by prescription, vitiates it even in the hands of a third person, bona fide, and for a valuable consideration.

28th. To make the acts, words or conduct of a person evidence against his rights, by way of disclaimer, assent or abandonment, it should satisfactorily appear that at the time of such acts, words or conduct, he was well aware of his rights, was free to do and say as he pleased, was under no improper restraint or influence, and was aware of the effect of such acts, words or conduct, and that they were free and voluntary.

The defendant then moved the following, which were given:

1st. If the jury find from the evidence that the lot in dispute is embraced in the tract of land sold by the sheriff, Conner, to Alexander McNair, in 1808, as the property of Jacques Clamorgan, then the confirmation to Clamorgan enures to the purchaser at that sale, and those claiming under him, and the plaintiff cannot recover.

2d. If Jacques Clamorgan in his lifetime abandoned the tract of 1 by 40 arpens, mentioned in the confirmation of the board of commissioners of 13th Nov., 1811, and the said Conner took and held possession thereof afterwards, claiming to own it, then all of Clamorgan's title therein at the time of said abandonment, was divested out of him.

3d. The Spanish law was in force on the subject of abandonment till after the year 1814, in this country, and that abandonment according to that law, was a relinquishment of the possession thereof by the owners, with the intent that it should never be any longer his.

The plaintiffs excepted to the opinion of the court in refusing the instructions moved by them and in allowing those given on belief of the defendant, and the defendant excepted to the opinion of the court in giving the instructions allowed on behalf of the plaintiffs and refusing those asked by defendant, and which were disallowed by the court. After the verdict the plaintiffs filed a motion for a new trial assigning the usual reasons, and the refusal of the court to give the instructions asked for by the plaintiffs, which were disallowed, and the giving of the instructions allowed on behalf of the defendant. The court overruled the motion for a new trial, to which the plaintiffs excepted and have brought the case to this court by writ of error, assigning as error:

1st. The refusal of the court to grant the plaintiffs a new trial.

2d. The refusal of the court to give the instructions asked for by the plaintiffs and which were disallowed.

3d. The giving of the instructions on behalf of defendants.

4th. The admission of incompetent evidence on behalf of defendant.

CROCKETT & BRIGGS for plaintiffs in error.

1st. That before the confirmation and patent, the legal title to the premises in dispute was in the United States, and the effect of the confirmation and patent was to vest the legal title in Clamorgan, his heirs, devisees, or assignees, and the confirmation and patent presuppose the existence of all the facts necessary to their validity.

Polk's lessee vs. Wendell 9 Cranch 98; Masters vs. Eastis 3 Port (al) R. 372, Jackson Ex dem. Mancius vs. Lawton 10 John 23; Polk's lessee vs. Wendell 5 Wheat 293.

2d. That the confirmation to Clamorgan on the 13th Nov., 1811, is conclusive as against all persons whomsoever. That at the date of said confirmation the title was in said Clamorgan and no title can avail the defendant in this action which he or those under whom he claims, acquired

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prior to the confirmation, and whether the same were an adverse title to that under which Clamorgan claimed or was derived under him by sheriff's deed is immaterial,

Strother vs. Lucas 12 Peters 458; Mackay v. Dillon 7 Mo. R. 13; Newman vs. Lawless 6 Mo. R. 279, 297; United States vs. King 3 Howard 787.

3d. That the title being in Clamorgan by the confirmation, it did not have relation back to the inception of the title in such manner as to vest in McNair, the purchaser at the sheriff's sale in 1808, the *legal* title acquired by Clamorgan under the confirmation. Because,

1st. The confirmation is to Clamorgan in terms, in his own individual right and enures to his sole use and cannot be construed as a confirmation to the use of whosoever might hold the better equity. See authorities last cited.

2d. The sheriff's deed to McNair was without covenants of warranty or seizin, and was in terms only a conveyance of such right, title and interest as Clamorgan then had in the premises. In such case, the title afterwards acquired by Clamorgan under the confirmation, did not enure to the benefit of McNair, the purchaser at the sheriff's sale. Masters vs. Eustis 3 Port (Al) R. 368; Evans vs. Labbadie 20 Mo. R. 429; Newman vs. Lawless 6 Mo. R. 290; Le Bois vs. Brummel 4 Howard 462; 14 John 193; 13 John R. 463; 3 Litt R. 472; 12 Pick. R. 47; 13 Pick R. 116.

4th. That the sheriff's deed to McNair in 1808 is void for the following reasons. Because:

1st. There was no service of process or appearance on the part of Clamorgan in the suit of Sappy Exr of Reihle vs. Clamorgan. Sanders H. vs. Jennings 2 Dana 37; Bascom vs. Young 7 Mo. R. 1; Smith vs. Ross & Strong 7 Mo. R. 463.

2d. There was no sufficient description of the premises in the levy advertisement or deed, and the deed is therefore void for uncertainty. Evans vs. Ashley 8 Mo. R. 177; Rector vs. Hart 7 Mo. R. 534; 2 J. J. Marsh 33; Rector vs. Hart 8 Mo. R. 448.

3d. Clamorgan at the date of said levy and sale had no title in the premises which could be sold under execution and enforced at law.

5th. That the deed to McNair of 1808 is void as to the plaintiffs Landes and Sharp, because it was not recorded until after they acquired title, and after the commencement of this suit. 1 Edwards Comp. p. 47, Sec 8. Nor is it material under the law governing the deed of 1808, whether Landes and Sharp had notice of it or not. It was void against subsequent purchasers for value, whether with or without notice. But in this case there is no evidence of notice to Landes and Sharp, unless it can be inferred from adverse possession. In this State, such notice will not be inferred from adverse possession, but *actual notice* must be proved. Frothingham vs. Stacker, 11 Mo. R.

6th. That the defendant, or those under whom he claims, have no title under the Spanish law of prescription, because

1st. The law of prescription did not prevail in this territory when Carr, under whom defendant claims first took possession.

2d. If it did then prevail it was abrogated by the introduction of the common law in 1816.

3d. If not sooner abrogated, it was clearly abolished by the statute of limitations of 1818, at the time of the passage of which act, Carr and those claiming under him had not a title by prescription, having then been in possession less than ten years. 1 Territorial Laws, 598.

4th. If the prescription were otherwise valid, it was void in this case, for the reason that Carr took possession in bad faith, having taken the title from Esther with a knowledge of Clamorgan's title, and that his claim for confirmation was then pending before the board of commissioners, and the court below erred in refusing to allow the jury to pass upon the question of bad faith in Carr; the jury were entitled to decide upon Carr's credibility as to the circumstances under which he took possession. But the court refused to instruct the jury that his possession must have begun with an honest and sincere belief of right to the property, &c. (See instructions marked 39 and 16, 18, 19, statement of case.) In this the court erred.

5th. The confirmation to Clamorgan is conclusive against any title by prescription prior to that time, and after the confirmation there was not a space of ten years within which the

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prescription could be consummate, until it was arrested by the introduction of the common law in 1816, or the statute of limitation of 1818.

7th. That Carr, or those claiming under him, acquired no title by the Spanish law of abandonment, because

1st. That law was not in force in the territory when Carr took possession. 1 Territorial Laws 47, Sec. 8.

2d. If there was any abandonment by Clamorgan in the sense contemplated by the laws of Spain, it was before the confirmation; and the title acquired by such abandonment is concluded by the confirmation.

3d. There was evidence tending to show that if Clamorgan did abandon as proved by Carr, he did it, under the mistaken belief that he had already lost the title by the sheriff's sale to McNair, and under the influence of threats, used by Carr as to Clamorgan's transactions with Esther, and therefore the court erred in refusing the instruction asked for by the plaintiff on that subject. (See instruction No. 40 in statement of case.)

8th. That O'Fallon and Lindell, and those claiming under them, acquired no title under the deed of 1826 from sheriff Walker, because

1st. The judgment in the case of Easton vs. Clamorgan's executor, was irregular and void.

2d. At the date of the execution by virtue of which the said sale was made, no execution could lawfully issue against the estate of deceased persons, such execution would necessarily defeat the classification of demands against the estates of deceased persons, as then established by law. Revised code of 1825, page 112 Sec. 50.

And thus notwithstanding that the act of 1825 last referred to, (sec. 49) provides that no execution shall be issued against executors or administrators until eighteen months after the grant of letters &c.; section 50 is repugnant to section 49, and they cannot stand together. Section 50 must prevail against the other, because it comes after it, and because one of the objects of the entire act was to classify demands, which would be utterly defeated by allowing the assets to be sold on execution; such was the construction of the succeeding legislature which repealed the clause allowing executions vs. executors and administrators. 2 Territorial Laws 103.

3d. The said execution was void because it was generally against the goods and chattles, lands, tenements, whereas it should have directed the sheriff first to levy of the goods and chattles, and for want of sufficient goods and chattles, then of the lands and tenements. Revised code of 1825, 383 Sec 2 Garithy's lessee vs. Ewing, 3 Howard 707; 1 Blackford R. 210.

4th. The said deed was void for uncertainty. It contained no sufficient description of the premises, and that which it did contain was utterly erroneous. It professed to describe them not as they existed at the time of the sale, but as they had existed more than twenty years before, and that too by reference to a deed from Dodier to Clamorgan, when in fact no such deed existed. Evans vs. Ashley, 8 Mo. R. 177; Rector vs. Hart, 7 Mo. R. 534; 1 Har. and J. 449.

5th. The said deed was void because the said premises had before the levy and sale been laid off into streets lots and blocks, distinctly marked by stones and other visible monuments, and should have been so described in the levy and advertisement, whereas in the said levy and advertisement it was described only as a tract of one by forty arpens, without any reference whatever to the fact that it had been laid out into lots, blocks and streets, and then constituted a part of the city of St. Louis. Evans vs. Ashley, 8 Mo. R. 177.

6th. The said premises were susceptible of division, and at the date of the sale were worth at least ten thousand dollars. The sale by sheriff Walker to O'Fallon and Lindell of the same premises for thirty-three dollars, was upon its face fraudulent and void Tiernan vs. Wilson, 6 John C. R. 416; 4 Cranch 403; 18 John R. 362; 3 Blackford R. 376; 6 Wend 522.

9th. That O'Fallon and Lindell, and those claiming under them, cannot avail themselves of any possession of the premises in controversy as adverse to the plaintiffs claim, prior to

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the date of the deed from sheriff Walker to said O'Fallon and Lindell in August 1826, because by accepting such deed they are estopped to deny that prior thereto, the title was in Clamorgan or his representatives, Jackson ex. dem. Siressabaugh vs. Sears, 10 John 435; Fitch vs. Baldwin, 17 John 161; Jackson vs. Ireland, 3 Wend 99; Jackson vs. Hyers, 14 John 224, and cases there cited; Jackson vs. Britton, 4. Wend 507.

10th. That the statute of limitations cannot avail the defendants in this court, because

1st. That ground of defence was excluded from the jury by the court below, and consequently the jury did not pass upon it.

2d. There is no proof of actual uninterrupted adverse possession on the part of the defendant and those under whom he claims for twenty years next before the commencement of this suit.

3d. Cyprian and Apoline, under whom the plaintiffs claim were infants at the date of the passage of the statute of limitations of 1818, and having died within less than twenty years after that period, leaving the plaintiffs Louis and Henry their devisees, and the said Louis and Henry being then infants, they are within the proviso of the said statute. 1 Territorial Laws 598.

11th. That although under the statutes of this State an action of ejectment may be maintained upon an equitable title, yet such title cannot prevail against the legal title; that in this case the patent and confirmation, vests the legal title in Clamorgan, his devisees or assignees; that the defendant, or those under whom he claims, are not in a legal sense the assignees of Clamorgan, because

1st. The confirmation is conclusive that at the date thereof the title was in Clamorgan, and consequently the sheriff's deed of 1808 is concluded by it.

2d. The title derived by O'Fallon and Lindell under the sheriff's deed of 1826, is void therefore the defendant, or those under whom he claims, not being the assignees of Clamorgan, the confirmation and patent vested the *legal* title in Clamorgan or his devisees; and in this action the legal title must prevail against all equities. Chouteau vs. Eckert, 2 Howard 375; Hickey's lessee, vs. Stewart 3 How 750; United States vs. King and Howard, 787; Le Rois vs. Brammell 4 How, 449.

12th. That a grant from the government to a deceased person, before the act of Congress of 1836, was void, and conveyed no title to the heirs or other legal representatives; therefore, if Clamorgan had died, pending his claim before the board, and before confirmation, not having alienated the land, the confirmation would have been void, and his heirs would have acquired no title; nor can the vendee, without warranty, acquiring title pending the claim, and before confirmation, stand in any better condition than the heirs of the confirmees would have done if he had died before confirmation and without having alienated the land. Lewis vs. McGee, 1 A. K. Marsh 199; Bowman vs. Bartlett, 3 A. K. Marsh 86; Cooke R. 134.

SPALDING, for defendant.

1st. The first instruction asked by plaintiff below and refused, was erroneous, and rightly refused for the following reason, viz:

1st. Because the title did not pass by the patent, but by the confirmation by the board, and the patent was only the evidence thereto. 5 U. S Statutes 31, act giving effect to patents in name of deceased persons, which explains the meaning of the confirmation to Clamorgan to be in favor of his assignees. 3 U. S Statutes, 440, act of 3d March, 1807. Under the 2d second section of this act, the present claim was confirmed, and the 4th section declares the *decision of the commissioners final*, when in favor of the claimant. 9 Mo. R. 326, Harold et al vs. Simmons et al, that a confirmation by the act of 3d March 1807, or rather by the commissioners under it, passes the legal title. 6 Peters' Rep. 771, Strother vs. Lucas;

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12 Peters Rep. 453, 4 same vs. same. The confirmation by act of 13 June, 1812, gave complete title; a confirmation by a law is a good grant of title. 2 Howard's Rep. 319, Grignon's lessee vs. Astor. The title to land becomes a legal one when confirmed by Congress. (See 3d U. S. Stat. 724, for the act which requires a patent to issue, in 3d section though the title had passed as court holds.) Cottile vs. Snyder, 10 Mo. Rep., confirming decisions of Harold et al vs. Simonds et al.

2d. And the title which passed by the confirmation by the board on 3d Nov., 1811, *enured to the benefit of Connor as assignee of McNair*, by deed of 3d August, 1808, recorded 21st February, 1809, who was assignee of Clamorgan by sheriff's deed dated 8th July, 1808, under judgment and execution of Reilhes ex's vs. Jacques Clamorgan. At the time of the sheriff's sale to McNair, the time had expired for filing claims for confirmation. Act of 3d March 1807, Sec. 5. So that the assignee of Clamorgan could not present his claim for confirmation, and the only possible mode of perfecting the title was to let it stand on the notice and documents as filed by Clamorgan.

3d. The judgment of Executor of Reilhe vs. Clamorgan in 1808, May 16th was not void; but whether erroneous or not, was sufficient to uphold the sale under it. It is attempted to be impeached on the ground that no writ was served on Clamorgan the defendant; that therefore he was no party to it, and it is void.

1st. The record itself shows that he was a party by voluntary appearance. The correct doctrine is, that if the record shows that the defendant was served with process, or that he appeared personally or by attorney, it is sufficient; and it is not necessary that there shall be a formal entry that he appeared. It is enough, if the judgment be rendered against him, and if the record state that he previously acted in the case personally or by attorney. 7 Miss. Rep. 426, Day vs. Kerr; 6 Miss. Rep. 50, Griffin et al vs. Samuels; 4 Miss. Rep. 228, Lindell vs. Bank.

4th. There was no irregularity in the execution and sale sufficient to make the sale void. 10 Peters 472; Vorhees vs. Bank 2 Homan Rep. 319; Greguon's lessee vs. Astor, as to general principles 2 Ten. Rep. 44; 4 Dana 439; 5 John Rep. 89; 4 Wend. 462, 474.

5th. There was a sufficient description in the sheriff's deed to McNair. 4 Den. & Bat. 414. 1 Humphrey 80; 3 Yerger 371; 7 Yerger 490; 8 Gill and John 345; 2 N. Hamp. 284.

6th. The failure to record the sheriff's deed to McNair till 1846 does not affect the title of Connor and his representatives, the present occupants of the land in question.

1. Because the confirmation was a grant by the United States, and vested the title in Connor, assignee of Clamorgan, and the local law could not control the effect of the confirmation.

2. Because the law did not require the sheriff's deed to be recorded, nor impose any forfeiture for failure to record it. 1 Edwards Com. 46-47, sec. 8, passed in 1804. This does not include sheriff's deeds, as there could be none at that date, as the first authority for such deeds was in 1807, and the words of that section evidently do not contemplate such deeds, and this was the first act requiring deeds to be recorded, and was enacted in October, 1804. 1 Edwards Com. 120; 1 sec. 45-46-47 & 48. This act went into operation 1st Sept., 1807, and provides for sheriff's deeds, and for acknowledgment of the same in court in the county where the lands sold lie, and for an entry of record in the court of the acknowledgment of the deed containing a description of the lands. This was the only recording of a sheriff's deed then required.

1 Edwards Com. 543, in force 1st April, 1818. This act provides that all deeds, conveyances and other obligations for lands *thereafter* made, &c., should be recorded in three months. This has no reference to deeds already made.

1 Edwards 798, act in force 1st March, 1822, provides form of acknowledgment and proof of deeds and declares that deeds shall be valid only between parties and their heirs unless so acknowledged or proved and recorded. This is prospective, and does not affect past deeds.

6th. Plaintiffs instructions (Nos. 4, 8, 9, 10, 11, 18, 25,) relating to prescription, were refused correctly. No. 4 takes the whole matter from the jury, and substantially asserts that there is no

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evidence of prescription in Esther or any one claiming under her. The court had already given for plaintiffs the *first* and *third* instructions asked by them, substantially declaring there could be no prescription later than 17th Dec., 1818, and that the time for it must reach back ten years beyond that to be a bar, which would bring its commencement to 17th Dec., 1808. Now there was evidence of prescription.

1st. In favor of Esther from the date of the deed to her by Dodier, 4th Nov., 1793, which states that she was *then actually* in possession. 1 Partidas 369 and following also 394; 12 Peters Rep. 456, 462 & 461. 4 Frebero 470 No. 215, No. 471, No. 218, 5 Ditto 126, No. 145; 2 Partidas 1158 law 9; 5 Mis. Rep. 310. The Spanish law accompanies the deed, as in fact it did as stated in this case, and that when possession is once had it always in law continues, till actual relinquishment of it, and that it is presumed in law to continue and that such possession, that is, *constructive*, not *actual* is all that is necessary in prescription.

8th. The 12, 13, 14, 15 and 16th instructions of plaintiffs (refused) relate to the sheriff's sale and deed, &c., under judgment of Easton vs. Clamorgan's executors which was made in 1826. All these instructions were superseded and useless (if legal) as the court instructed the jury in the second of the plaintiffs instructions which were given, that the execution in that case on which the sale was made, and the sale itself and all proceedings thereunder were null and void. Having given this instruction, it was not the duty of the judge to repeat the same thing by instalments.

9th. The first and second instructions given for defendant, defined abandonment and submit the question of fact to the jury. The 26th instruction of the plaintiffs refused by the court.

The first and second of defendant's instructions are based upon the Spanish law. 1 Partidas 365 law 49 & 50; 12 Peters Rep. 456, that quitting of property with intention of never reclaiming it, is abandonment and loss of title.

The plaintiffs 26th instruction calls on the court to say to the jury that the words and conduct of a person are not *evidence* of abandonment, unless the party was well aware of his rights, was free to do and say as he pleased, was under no improper restraint or influence, and was aware of the effect of such acts, words and conduct, and that they were free and voluntary. The vice of this instruction is, that it does not leave it to the jury to determine how much and what effect the improper restraint may have had, and that it assumes that an *abandonment* does not work its legal effect unless the party abandoning is an enlightened jurist, and well knows what his conduct will result in. Now if a party does quit possession of his property with the intention it shall no longer be his, he loses it, whether he knows the law or not, and he may be under an *improper influence*, and yet may still be able to abandon his land, the jury perhaps thinking if permitted to pass upon it, that such influence did not cause the abandonment or contributed so little to it as not to be regarded.

The recording act does not repeal the law of abandonment in 1804, any more than it repeals title by descent or escheat or prescription.

10th. The 17th, 19th, 20th, 21st and 22d instructions of plaintiff relate to the act of limitations, and were refused properly.

The 17th is exceptionable in asserting that if the statute begins to run, it is interrupted by the accruing of a disability.

The 19th and 20th assume that the purchase by O'Fallon and Lindell and sheriff's deed to them on 10th August, 1826, deprives the defendant of the right of setting up the previous possession by Conner (who conveyed to O'Fallon in 1820) as adverse to the plaintiffs and others under whom they claim, that is, a *person* in possession of land under color of title, cannot purchase in a claim or pretence, on execution, to the same, under the penalty of creating an estoppel against his previous possessions operating as a bar! This position is unreasonable and unjust, and not warranted by the authorities. 9 Mis. Rep. — Macklot vs. Dubruel repudiates all such estoppels; 8 Cowen 409, 410 shows the practice in New York.

Entry under deed of survey and actual possession of part, claiming the whole, is a possession

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of the whole for the purposes of limitation. 5 Peters Rep. 320; 1 Rep. Con't 97; 8 Wend. 440; 1 Littell 260.

SCOTT, judge, delivered the opinion of the court.

An attempt will not be made to review each instruction that was given and refused in this cause. They are numerous, and such a course would lead to great prolixity. It will be sufficient to advert to the main questions of law arising on the facts, and when they are determined, they can with facility be applied in adjusting this controversy.

The view taken of the effect of the act of confirmation by the board of commissioners, will do away with the necessity of investigating the validity of the judicial proceedings in the case of Sarpy against Clamorgan, and of the sheriff's deed under those proceedings, dated July 8, 1808. But it must be said that when consideration is made of the loose manner in which business was transacted in those days, that the ministers of the law were mostly instructed in one system, and acting under another of which they were ignorant, a state of circumstances can scarcely be conceived which would warrant a court in overturning a sheriff's sale of that date, especially as possession has followed and continued with the act. Every consideration of policy in such a state of things requires a liberal indulgence of the maxim *ex diuturnitate temporis omnia presumuntur rite et solemniter esse acta*. As to the alleged want of notice by Clamorgan of the proceedings against him, the cases heretofore decided by this court answer this objection. His appearance is entered of record, and surely that fact cannot be controverted in a collateral proceeding. Indeed, if a writ of error was brought upon this judgment, the ground is not perceived on which it could be reversed. 1 Green Evi. sec. 19; Hart and others vs. Seixas, 21 Wend. 40. But if a judgment is merely erroneous, its validity cannot be questioned collaterally; it can only be affected by a direct proceeding to reverse or vacate it.

A question of importance in the cause, is, as to the operation of the confirmation to Clamorgan: whether it conveyed the legal title of the lot to him or to Conner. After much deliberation, no tenable grounds have been perceived on which the opinion can be based, that by the confirmation the legal title of the lot became vested in Conner. By purchasing Clamorgan's interest in the lot during its pendency for confirmation, Conner became the beneficiary owner of the same, and, under our system of law, he was entitled to a conveyance of the legal ti-

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tle. But there is a marked difference between a right to a legal title and the actual possession of it. That difference is as well defined and as well established as any principle of the law. The profession have acted upon it, and the consequences may be foreseen, which may result from its overthrow. That such a cause may disturb titles, is unquestionable. Under the laws involving this question, a confirmation is equivalent to a patent. If the principle contended for is applicable to a confirmation, it is equally so to a patent. When congress enacted that the death of a patentee at the date of the patent should not avoid the grant, but that it should enure to the benefit of the heirs or assignees of the patentee, it clearly expressed its sense of this question.

Nothing is to be found in the acts of 1805 or 1807 which warrants the opinion that the confirmation passed the legal title of the estate confirmed to any other person than the claimant. The act of 1807 speaks of the claimant or his legal representatives ; but clearly it contemplates only those representatives who file their claims before the board as assignees under the original claimant from the Spanish government. If one is a representative, and he does not prefer his claim as such for confirmation, he is not regarded by the act. That Conner's title did not accrue until after the time for filing claims, cannot affect this question. The 4th section of the act of 1805 prescribes that every person claiming lands shall file his claim. The 6th section of the act of 1807 directs that reports of the final decisions in favor of claimants be made to the secretary of the treasury, and that a certificate shall be issued to the claimant showing that he is entitled to a patent ; thus clearly evincing that in the contemplation of congress, the legal title could only pass to the claimant.

The force of the argument drawn from the nature of titles existing in the then territory, is not perceived. Whether they be termed legal or equitable, complete or inchoate, does not affect the question. It is admitted on all hands that the fee of the lot was in the United States, and that an action of ejectment can only be maintained by him in whom that fee has been vested. When a particular person claiming a tract of land, and it is confirmed to him by name, and that confirmation passes the title, how can it be maintained that the title did not pass to the claimant but to some other person. It may be that it ought to have passed to him, but that is not the inquiry. It is, to whom did it actually pass ? Nor is it perceived that the fact that there was no distinction between courts of law and equity at that day, affects this question. It may be that there was no such distinction, but are we therefore to infer

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that the Spanish system of jurisprudence was so defective as not to furnish any redress in cases where one obtained a title to land which belonged to another. If, by that system of law, a beneficiary owner could have maintained an action against the owner of the fee, does it follow that he would at this day be entitled to such remedy under an entire different system? The commissioners had no authority under the laws which controlled their action to pass the fee of the government to any other person than the claimant on the record before them. Had they expressly confirmed the claim to any one except the claimant, their act would have been void. If, then they could not convey the legal title to any one else than the claimant directly by name, on what principle can their act be held to have done that indirectly which they could not do directly. The law declared that the action of the board should be final between the United States and the claimant. The United States and Clamorgan were the only parties to the proceeding before the board, and the board declare that as between them the title is in Clamorgan. By law, then, it must have gone to him. Under the act of 1807 the decision of the commissioners had the same effect as an act of congress would have had on claims reported under the act of 1805. Now will any one contend that the act of confirmation passed by congress conveyed the legal title of the lands confirmed to any others than those in whose names the claims were reported? The case of Strother vs. Lucas, reported in 6th and 12th Peters, is one involving the construction of the acts under which this confirmation was made. It is conceded that that case is different from this, but it affords no ground for the opinion that a confirmation of the commissioners enured to the benefit of any one else than the claimant. On the contrary, it fully maintains that a confirmation under a law is as fully and to all intents and purposes, a grant, as if it contained in terms a grant de novo; and that it is inconsistent with all the acts of congress which have organized boards, that the confirmations of the commissioners should enure to any other uses, or to any other person than the person or persons claiming the confirmation.

The Spanish law of abandonment declared that if a man be dissatisfied with his unmovable estate and abandon it immediately, he departs from it corporeally with an intention that it shall no longer be his, it will become the property of him who first enters thereon. That although the owner had not corporeal possession of this estate, he would nevertheless retain the property of it in his mind, and therefore no other person ought or can enter upon it. 1st Par. Law 50, page 365. The com-

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mon law not being in force in this State prior to 1816, the law of abandonment prevailed here previous to that time. From this law it is manifest that whether a party abandoned his property or not, depended altogether upon his intention to be ascertained from circumstances. It is a question peculiarly appropriate to be submitted to the consideration of a jury. The law is plain when the facts are ascertained. The instruction asked on this subject was properly refused. The phrases "well aware," "free to do or say," "under no improper restraint," were not sufficiently pointed, and might have misled the jury. No doubt an abandonment must be voluntary, nor can there be an intent to abandon without some consciousness of the ownership of the thing abandoned.

The common law of England was introduced into this State by an act passed 19th January, 1816. By the common law no limitation of time was fixed within which actions were required to be brought. Prior to the fourth year of the reign of James the first, the act of the 32d Henry the eighth limiting the time within which real actions should be brought had been enacted in England; yet from the preamble to the act of limitations, passed 17th Dec., 1818, it would seem that the legislature, acted under the belief that no limitation existed at that time, fixing the period within which real actions should be brought. Hence it might be inferred that the law of prescription did not prevail at the introduction of the common law. Be that as it may, the act of limitations must have abolished all prescription. The proviso of that act permits all persons then having a right of entry, without regard to the period when it accrued, to bring their actions within twenty years. Now ten, twenty, or thirty years would give a right by prescription, according to the circumstances under which the possession commenced. But it is said that as to existing rights of entry, the statutes ought to be construed cumulative to the law of prescription; otherwise a person within a few days of the period at which his title would be perfected by the law of prescription, would be exposed to an action for twenty years after the passage of the act. But take the case where the right had accrued but a few days before the enactment of the statute, could a party under any circumstances, in the very teeth of the law, acquire a right within ten years, as it might have been done under the law of prescription?

The lot having been confirmed Nov. 13, 1811, ten years, the shortest period within which a title could have been acquired by prescription, had not elapsed before that law was abolished by the statute of limita-

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tions. The title only passing from the government by the act of confirmation, the statute did not run but from that time. It has been repeatedly held that the statute of limitations does not run against the United States. *Lindsay vs. Miller* 6 Pet. 666. So the statute of limitations does not run against the government or its grantee in favor of one who does not hold the entire title. Until the title emanates, the possession is not adverse, but under the government. It is analogous to the case of one entering under a contract to purchase. *5 Bin. Morris vs. Thomas* 77; *5 Cow. 92*; *12 Mass. 327*; *Johnson vs. Irwin* 3 S & R 292, *Duke vs. Thompson et al* 16 Ohio Rep. 34.

The statute of limitations relative to real actions first introduced into this State is a copy (as were many other of our early laws) of the statute of Pennsylvania. In the construction of the Pennsylvania statute (as it has been of all other statutes on the subject) it has been held that when the bar once begins to run no subsequent disability is regarded, but the action must be brought within twenty years from the time the statute commenced running. *Hall vs. Vanderbright* 5 Bin. 374. Whatever may be the meaning of the last clause in our statute of limitations which is not found in the act of 21st James 1st, it cannot apply to this case, as the parties do not come within its provisions. Cyprian and Apoline, under whom the plaintiffs claim, were born in June and February, 1803. They consequently attained their majority in 1824, and the statute commenced running against them from that time. Their deaths afterwards, within the twenty years, within which they were required to bring suit, although their title may have devolved on those who were under a disability, did not prevent the running of the statute. The suit was not brought until 1845, consequently the plaintiffs were barred if there were twenty years continued adverse possession.

This court has not adopted the principle that in a contest between two alienees under the same alienor, one of them is estopped from showing an outstanding title adverse to that of his grantor. This doctrine, though prevailing in some courts, was not sanctioned by others, and from the disinclination to receive it, this court thought itself warranted in refusing its sanction. The cases in New York which seem to give countenance to the doctrine that one accepting a title is estopped from claiming adversely to it, prevailed when it was the law of her courts that a grantee could not dispute the title of the grantor. *Macklot vs. Dubriel* and the cases there cited. The acceptance of the sheriff's deed in 1826 did not estop those under whom the defendant claims. We maintain that a purchaser holds adversely to his vendor. The question

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of adverse possession, is one of law and fact. We will not undertake to say that a purchase may not be made under circumstances which would warrant the jury in finding a recognition of the title of the vendor, but we do say that the mere fact of purchasing a title does not by operation of law prevent the vendee from insisting on a possession adverse to that title. A person may be in possession of lands, claiming title and in his anxiety to secure his estate beyond all cavil, or to prevent litigation, buys in an outstanding title of whose defects he knows nothing, nor does he care for them, as he relies on his own original title. If a suit is afterwards brought by one claiming under him from whom the outstanding title is derived, it would be extremely unreasonable that he who purchased the outstanding title, for the sake of quiet and repose, should be precluded from setting up, as a defence to the action, his possession under his original title. Why should men be restrained from buying their peace under the penalty of losing their estates? Are not men daily buying titles adverse to those under which they hold, without any confidence in their validity, but merely to remove specks or shadows from their titles, which may affect the price of their lands in market. A contrary doctrine must have its origin in feudal reasons which have long since ceased to have any influence. *Cessante ratione cessat et ipsa lex.*

It is a matter of history of which this court will take judicial notice, that at the time of the cession of Louisiana to the United States, in that portion of the territory of which this State is composed, nineteen-twentieths of the titles to lands were like that involved in this case prior to its confirmation. There were very few complete grants. Most of the inhabitants were too poor to defray the expenses attending the completion of their titles, but they had faith in their government, and rested as quietly under their inchoate titles as though they had been perfect. Stoddart's sketches 245. As early as Oct., 1804, we find the legislature speaking of free-holders, and authorizing executions against lands and tenements. See law establishing courts for the trial of small causes passed Oct., 1804, sec. 10. There being so few complete titles the legislature in subjecting lands and tenements generally to execution, must have contemplated a seizure and sale of those incomplete titles which existed under the Spanish government. At the date of the act above referred to, no titles had been confirmed by the United States. An instance is not recollect in which a question has been made as to the liability of such titles as Clamorgan's under the Spanish government to sale under execution. It is believed that such titles have been

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made the subject of judicial sales without question even since the change of government.

As this question was involved in the cause and discussed, we have noticed it, although it is not within the course prescribed at the beginning of this opinion.

No error is seen in the refusal of the court to give the instructions relative to the appropriateness of the description of the lot contained in the advertisement under which the sale was made to O'Fallon and Lindell. Clamorgan owned the whole lot and the whole was sold. In this respect the case differs from that of Evans vs. Ashley. That the lot was subdivided into streets and alleys, that it was sold in mass, and that a greater quantity was sold than was necessary to bring this case, so far as these objections are concerned, within the principle of the case of Hart vs. Rector, reported in the 9th Mo. Rep. It is there shown that such irregularities in a sheriff's sale will avoid them in direct proceedings instituted to vacate them, but that they cannot be annulled collaterally. The authorities are there cited and the argument made, and it is useless to repeat it here.

Whether the description of the premises sold was sufficient, would depend on extrinsic circumstances. If the lot was known by the description given, the sale would be valid according to the principle settled in the case of Hart vs. Rector, 7 Mo. Rep., and parole evidence was admissible to establish that fact.

The seventh instruction given for the plaintiff's, recognized this principle, and so far was correct. That a part of the description was false, will not vitiate the sale, according to the maxim *falsa demonstratio non nocet*, when the thing itself is certainly described ; as in the instance of the farm called A, now in the occupation of B ; here the farm is correctly designated as farm A, but the demonstration would be false if C and not B was the occupier, and yet it would not vitiate the grant.

The objection to the form of the execution is not sufficient to invalidate the sale to O'Fallon and Lindell. It is important to the interests both of plaintiffs and defendants that the title of a bona fide purchaser at a sheriff's sale, should not be affected on account of any error or irregularity in the judgment or execution. A writ of error will be upon the award of an erroneous execution. Cokes Ins. If on such writ the execution should be avoided, a previous sale under it would not be affected, more than a sale under an erroneous judgment. Manning's case, 8 Cokes Rep. The authorities cited by the plaintiffs do not support the objection. Under the execution law it was in the power of the

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defendants to elect on what property an execution should be levied, whether on real or personal. Dig. 1825, sec. 11. No inconvenience then would likely arise from the form of the execution adopted in this case. Courts might interfere with such process and amend it, or might restrain its execution in any other manner than that authorized by law, but there is no principle on which a sale under it could be declared void in a collateral proceeding.

Prior to the act of Dec. 30th, 1826, the sale of the lands of deceased persons was authorized under executions against their personal representatives. Such sales are expressly allowed by the administration law of 1825, sec. 49, after the expiration of eighteen months from the granting letters testamentary or of administration. Indeed, the right to an execution against a decedent's real estate was never doubted. *Scott vs. Whitehill and Finch* 1 Mo. Rep. 494, (691) 549, (764.) *Rankin vs. Schatzell* 12 Wheat. 177.

The instruction to the effect that the statute of limitations did not commence running until the survey of the lot in 1826, was properly refused. The confirmation was a grant of the claim confirmed. A survey of the claim was filed with the board. Our statute relative to ejectments gave an action on a confirmation by the board of commissioners. The survey contemplated by the act of 1807, was a private act, and as it was to be at the costs of the confirmee, it is to be presumed that he would take the initiative in having it made.

The other judges concurring, the judgment will be reversed and the cause remanded.

NOBLE vs. STEAMBOAT "ST. ANTHONY."

1. The statute of this State concerning boats and vessels, is limited in its provisions to contracts made *within the State*, with boats used in navigating the waters of this State.

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NOBLE vs. STEAMBOAT "ST. ANTHONY."

1. The statute of this State concerning boats and vessels, is limited in its provisions to contracts made *within the State*, with boats used in navigating the waters of this State.

ERROR TO ST. LOUIS COURT OF COMMON PLEAS

NOBLE vs. STEAMBOAT ST. ANTHONY.

CROCKETT & BRIGGS, for plaintiff.

The only question presented in the case is, whether the defendants demurrer to the plaintiff's amended complaint, was properly sustained. The cause of action set forth in the complaint is essentially different from that in the case of Raritan vs. Pollard, 10 Mo. R. 583; and fairly presents the question whether our statutory lien is strictly to be confined, in all cases, to causes of action arising within the territorial limits of this State. In this case, the complainant alleges that at the time the articles were furnished, the boat had just been completed at Pittsburgh; had never made a voyage, but was destined for the navigation of our waters, and was then on the eve of her departure for St. Louis; that she came directly to St. Louis, where she had since continued to be employed in our waters, and that the articles furnished were still on board at the time of the institution of the suit, and that by the laws of Pennsylvania the plaintiff had a lien, &c. In the case of Raritan vs. Pollard, we do not understand the court to decide that the statutory lien is to be confined exclusively to causes of action arising within the limits of this State, but that it was extended to cases where the boat is plying to our ports, even though she may in the course of her voyages go to other ports, and in such cases it is immaterial whether the debt was in fact contracted in this State or not. The material point is, whether the vessel was one "used in navigating the waters of this State." If so, then from the very letter of the act the lien attaches. The object of the act seems to have been to give the lien upon all vessels used in navigating our waters, in whatever jurisdiction the debt might have been contracted.

GAMBLE & BATES, for defendant.

We understand it to be settled by the decisions of this court, (as it is fully established in Ohio, and perhaps other western states,) that our boat law is local in its objects, character, and effects. That such action and lien cannot be maintained here on a foreign claim. See 10 Mo. R. 583, S. B. Raritan vs. Pollard, Ib. page 586, S. B. Time vs. Parmalee.

The allegation in the complaint that this claim had a statutory lien in Pennsylvania, is nothing to the purpose. The Pennsylvania act, like ours, is local; and in no conceivable case can our courts enforce it. It is not a Pennsylvania, but a Missouri lien that is sought to be set up and enforced here.

Neither is there any thing in that other allegation[that this boat was built for the Missouri trade, and destined to navigate our waters. The lien and the right of action cannot depend upon the intention of the party, which may be changed at pleasure, or defeated by accident, but must depend upon the creation of the debt, and its time and place. Under our law, the lien can last but six months. When shall it begin? at the creation of the debt, or when the boat begins to navigate our waters? If the former, the lien will have a legal existence, when peradventure the boat may never be in our waters. If the latter, the commencement of the lien, and the consequent right of action, must depend upon the will and pleasure of the captain, who may put it off for as many months or years as he chooses.

NAPTON, judge, delivered the opinion of the court.

This was a proceeding under the act concerning boats and vessels. The grounds of the action, as stated in the complaint, were the furniture and equipment of a steamboat, procured at Pittsburgh, in the State

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of Pennsylvania. An allegation was made in the complaint that by the law of Pennsylvania, the plaintiff was entitled to a lien for the articles so furnished. There was a demurrer to the complaint, which was determined in favor of the boat, and this decision presents the only point for our consideration.

We understand our statute to have no extra territorial operation, but that its provisions are limited to contracts made with boats "used in navigating the waters of this State." Citizens of other states may resort to our courts to enforce their contracts under the general law applicable alike to our citizens and strangers; but the act concerning boats and vessels was designed to afford a speedy and convenient remedy to our own citizens, and to such others only as are engaged in trade within our jurisdiction at the time of their contracts. The contract in this case was made in Pennsylvania; it was not made with a boat, or the owners of a boat used in navigating the waters of this State, but with a boat lying at Pittsburgh, on the Ohio river; that the boat was designed for our trade can make no difference. This point was fully settled by this court in the case of S. B. Raritan vs. Pollard, 10 Mo. R. 583.

The allegation that, by the laws of Pennsylvania, a lien existed, does not give our court jurisdiction, or bring the case within the remedy given by the act concerning boats and vessels. The Pennsylvania law, like ours, is local, and must be enforced in the mode pointed out in their statute, and in the courts acquiring jurisdiction under it. Our statute does not authorize the lien acquired under the laws of Pennsylvania to be enforced here, and there is no principle of common or international law which will justify such a pretension.

The case of Champion vs. Jantzer, 16 Ohio R. 9, and Goodwell vs. Brig St. Louis, Ib. 178, are in point under a statute of Ohio substantially the same as ours, so far as this matter is concerned.

Judgment affirmed.

THE STATE to the use of MOVERS et al vs. O'FALLON,

**THE STATE TO THE USE OF MOVERS ET AL vs. RULAND
AND O'FALLON.**

1. A clerk is not guilty of a breach of official duty in refusing to issue more than one execution at the same time to different counties.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

LESLIE & LORD, for appellant.

1st. Can a plaintiff have several executions of the same kind running to different counties at the same time.

2d. If he can, is the clerk who refuses to sign and seal them, liable to an action, &c.?

The real question to be settled here is, can a plaintiff have several executions of the same kind running to different counties at the same time?

1st. Several executions may issue to different counties at the same time. Rev. Stat. Sec. 8 476 ; J. Cowen 456 ; Graham's practice 309 ; 2 Dunlap's pr. 771, Britton vs. Lawrence ; 9 Wendell 435.

2d. The clerk of a court is liable for refusing to issue process when such process is of right demandable.

This is too obvious to require comment.

SPALDING, for appellee.

The following points seem to be sustained for the appellees.

1st. That the statutes have, from the beginning of the American government down, authorized only one writ of execution at a time on a judgment.

2d. That even taking the most favorable view of them for plaintiffs below, the statutes never have enjoined, and do not now enjoin, the issuing of more than one at a time.

3d. That the most the plaintiff's can claim, is, that the statutes do not prohibit the issuing of two or more executions at once.

4th. That the present statute on the subject of executions is substantially the same as those in force for forty years past.

5th. That the unvaried and uniform practice, all that time has been, to issue only one execution on a judgment at the same time, and not a single instance is known or heard of to the contrary.

6th. That under the statutes as they have been, it was the duty of the clerk to conform to the practice, and not set up his better opinion against a long usage and contemporaneous construction.

7th. That although no decisions of court on this subject are reported, yet the practice and usage is the practice of the courts as the clerks generally, and the members of the bar generally, (from among whom the judges are taken,) were acquainted with it.

8th. That during all that long period thousands of instances must have occurred, in which it would have been all important to issue several executions at once, and yet the eagle eye of interest never could spy out the mode of doing it, aided by the subtlety, industry and learning of the bar.

9th. That authorities from other states, and from England, have little bearing on this subject. The common law, so far as not repugnant to other law, was introduced here in 1818,

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and our execution statutes had then been some time in force, and a construction put on them which has been adhered to ever since.

10th. That in such cases the peculiar usage or practice governs in the absence of express statutory provisions; at any rate, until judicial decisions alter the practice, and the clerk has no business to attempt to alter it, and might as well, of his own head, undertake to alter the long settled practice of the court on any other subject.

11th. That this suit is for a breach of the clerks official duty, on his bond, and does not allege any practice authorizing the issuing of fifteen executions simultaneously, and that under the statutes on executions as they existed, and as hinted at and interpreted by the legislature in sundry other other acts; and under the practice it was not his duty to issue those executions at once.

12th. That it is not the question whether he should have issued *two*, but whether he should have issued *all* asked for, fifteen in number.

13th. That even were we to hold ourselves bound by the practice of England and of New York, or of any other State, the clerk is not in fault, for no where has any such question arisen or been decided; but the point has been whether two executions only could exist at the same time, there being no case in England, or elsewhere going further, and of those two in England, only one was against *property*.

NAPTON, judge, delivered the opinion of the court.

This is an action of debt brought upon the official bond of the clerk of the circuit court of St. Louis county. The breach assigned is the refusal of the clerk to issue several executions upon a judgment in favor of the plaintiffs in interest, at the same time directed to different counties. There was a demurrer to the declaration which was sustained.

The only question is, whether the clerk was guilty of a breach of official duty in refusing to issue more than one execution at the same time to different counties.

Our statute contains no positive regulations on this subject. There is no provision in the execution law which gives any directions as to the number of executions a party may have upon his judgment, either directed to the same county or to different counties. The absurdity of issuing two executions of the same kind to *the same officers*, at the same time, sufficiently accounts for the absence of any explicit denial of such a practice: but the act is equally silent in relation to the right of issuing several executions directed to different counties. A critical examination of all its provisions, will scarcely afford any plausible argument on the one or the other side of the question. The law on this subject has been nearly the same from the organization of our territorial government. The first section of the act, as it now stands, declares that the party in whose favor a judgment has been rendered, shall have an execution in conformity with the judgment. The act of Oct. 30th, 1810, is

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almost in the same language. "It shall be the duty of the clerk of every court of record, to issue a writ of execution in conformity with the judgment rendered." Geyer's Dig. p. 265. The eighth section of the present law says that executions issued upon any judgment may be directed to and executed in any county in this State. The act of July 3d, 1807, authorized the court of common pleas, (afterwards the circuit court,) to issue executions into any district, (afterwards counties) "where it hath been certified to such court that the defendant has no estate in the district" (or county) of venue. Geyer's Dig. 267. Where the statute declares that a party may have an execution in conformity with his judgment, we do not understand it as restricting him to a single writ; for it is admitted that he may have as many executions as may be necessary to enable him to reap the fruits of his judgment; provided only one is out at a time. Nor does the phraseology of the eight section, which authorizes executions to issue to any county, lead to the inference that more than one was intended to be permitted to issue at a time upon the same judgment. On the contrary, under the act of 1807, before the court was authorized to issue an execution into any district or county, except the county of venue, it must be certified to such court that the defendant had no estate in the county of venue. The present law has so far modified this enactment as to permit the execution to issue to any county, without first issuing an execution to the county of venue. A comparison of the two laws, if it affords any argument at all, certainly furnishes one against the construction which would authorize more than one writ at a time.

The practice in this State, conforming itself to what has been the general understanding of the profession, has been to issue only one writ at a time. This practice, we are assured by gentlemen whose experience at the bar reaches back for thirty years and upwards, has been coeval with the first organization of our territorial government, and uniformly been continued to the present day. This practice, it is true, has been of a negative character. It is not known that any attempt has been made to issue more than one writ at a time, and there is no adjudged case. But there must have been numerous cases in which such a course would have been very convenient, and would hardly have been overlooked, if the law had been supposed to authorize it. The absence of any attempt to issue more than one writ, at the same time, during so long a period, is certainly a very strong indication that the opinion of the profession was against it.

The question as to what the English practice is, has been learnedly

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discussed in this case. We have not thought it necessary to investigate the subject, and most of the books of practice to which we have been referred are not accessible. The extracts from Tidd, Sellen, Archbold, &c., to which reference has been made, would indicate pretty conclusively that the modern English practice is to issue more than one writ at a time to different counties. How far back this practice dates, we have not the means of ascertaining. From the manner in which these writs are issued, the second writ always reciting the first, like the *testatum pluries*, &c., of original or mesne process, I should infer that the *theory* of the English practice, like our own, and the primitive practice also, sanctions only one writ at a time; and that a writ did not issue to another county than the county of venue, until one had first issued to the county of venue. The practice is now in England for all these writs to issue at the same time. The supreme court of North Carolina, in the case of McNair vs. Ryland, (2 Dev. R. 42,) appear to have been satisfied, upon investigation, that the practice of suing out as many writs as the party thought proper, was well known in England, and the supreme court of Tennessee assert the same thing in Parish vs. Sanders & Marlin, (3 Humphry 431.) There is no doubt that this practice prevails in New York, and was pursued there before the law expressly sanctioning it in the revised code of 1830. It is also the practice in some of the other states.

But the practice in England and in other states can have but little influence in determining the question which is presented by this record. We are not now to determine whether, if the clerk had issued the writs demanded, he would have acted illegally, or subjected himself to any penalty; nor whether it would have been error, had the court, of which he was clerk, under the circumstances, ordered the writs on the application of the plaintiff. The case is very different. The clerk has simply declined to act in a case where the statute is silent; and the practice of his predecessors for forty years has been against such action. He was called upon to set a precedent on his own responsibility; to give a new reading to a statue without the interposition of the court, and against the opinion of the profession, who were interested in giving such a construction to the law. We should be very reluctant to believe that, under such circumstances, a ministerial officer is liable for damages. It would be abhorrent to our notions of equity, to visit a heavy penalty upon an officer for even committing an error under such circumstances. How is the officer to regulate his conduct with safety to himself and his securities, if, left without any plain injunction or prohibition of the statute,

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he is still liable for inaction if the courts should think he might have acted, or for acting, if it should turn out to be the better opinion that such action was illegal.

We will not be understood as denying the liability of a ministerial officer for refusing to perform a duty plainly enjoined on him by law; nor do we think that, if the clerk had issued the writs demanded, he would have been liable. But as he declined to act, and, in so doing, followed in good faith the practice of his predecessors, we cannot see any legal ground for holding him responsible.

The other judges concurring, the judgment is affirmed.

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1. The act of the general assembly (Sess. acts, 1847, p. 123) imposing a tax upon lawyers, is constitutional.
2. A license to practice law is not a contract investing the person to whom it is granted, with rights which cannot be interfered with by the general assembly—it is a naked grant of a privilege which the State may revoke—or may impose such conditions upon its exercise as are deemed proper or demanded by the public interest.
3. If an indictment found upon the 7th and 8th sections of an act to sustain the credit of the State, (Sess. acts 1847, p. 123) follows the language of the act in its description of the offence charged, it is good.

APPEAL FROM ST. LOUIS CRIMINAL COURT.

BLENNERHASSETT for appellant.

1st. The indictment in this case is clearly [defective. It is not sufficient to allege merely in the words of the statute that the defendant practiced law, &c., for a livelihood. It should have charged that he practiced for fees, compensation or reward. Practicing law for a livelihood is a conclusion of law to be drawn from the fact of having practiced for fees and compensation, and if such fact exists, it ought to be stated.

The acts which the indictment alleges were committed by the defendant in his capacity as a lawyer, can only be regarded as specifications under the general charge of practicing law for a livelihood, but the indictment does not charge that any of these act were done for a livelihood or for fees or compensation. The special plea filed by the defendant, and the agreement entered

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into which the prosecuting attorney admit nothing more than the truth of the facts as they are, as the one set out in the indictment, and it is contended that they are wholly insufficient to authorize the rendition of the judgment in the criminal court.

2d. The statute upon which this indictment was founded is retrospective in its operation so far as this case is concerned and therefore unconstitutional.

The 17th section of the declaration of rights declares that no law retrospective in its operations can be passed. What constitutes a retrospective law has been defined by the supreme court of the United States, (Calder and wife vs. Bull 3d Dallas reports page 336.) Justice Chase, in delivering the opinion of the court in that case says: "Every law that takes away or impairs rights vested agreeably to existing laws, is retrospective, and is generally unjust and may be oppressive, and it is a good general rule that a law should have no retrospect, but there are cases in which laws may justly and for the benefit of the community, and also of individuals relate to a time antecedent to their commencement as statutes of oblivion and pardon."

McBRIDE, judge, delivered the opinion of the court.

At the July term 1847, of the criminal court of St. Louis county, the grand jury of said county found an indictment against Cyrenius C. Simmons, for a violation of the provisions of an act of the general assembly of this State, entitled "an act to sustain the credit of the State," approved 16th February, 1847. The indictment charges that the defendant, late of &c. &c., on the 1st day of March, 1847, and on divers other days and times between that day and the day of the finding of this indictment, with force, &c., at &c., he, the said defendant, being then and there, and on said other days and times a lawyer, following the practice of the law for a livelihood, unlawfully did then and there, and on said other days and times, as a lawyer as aforesaid, follow the practice of the law as a business, to wit: giving legal advice and counsel, instituting and prosecuting, managing and acting, arguing and defending lawsuits and causes and motions, for divers persons to the jurors aforesaid unknown, without then and there, and on said other days and times, having a license therefor, continuing in force contrary to the form of the statute, &c. The second count charges the same offence but with more particularity, and further charges the defendant with following the practice of the law as a business and for a livelihood.

To the foregoing indictment the defendant filed a special plea setting out that prior to the time laid in the indictment, he applied to and obtained from one of the judges of the circuit court of this State, a license to practice as an attorney and counsellor at law and solicitor in chancery, in the several courts of record in this State, which said license was granted in pursuance to a statute of this State then and now in force: that his said license continues in force, and that by virtue

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thereof he did the several acts charged against him, as he lawfully might do, &c. To this plea the circuit attorney demurred and the demurrer was sustained by the court. And the defendant not answering further to the indictment, the court assessed a fine against him and entered judgment thereon. The case is now before this court on writ of error.

The provisions of the statute supposed to be violated, are the seventh, eighth, ninth, and tenth sections, which provide as follows : "Every person or co-partnership of persons in this State, who shall follow the practice of the law for a livelihood in whole or in part, is hereby declared to be a lawyer. No person or co-partnership of persons shall follow the practice of the law in whole or in part, as a business, in this State, without first obtaining a license to follow such profession according to the provisions of this act; and every person or co-partnership of persons offending against the same shall forfeit to the State not less than fifty nor more than five hundred dollars for every such offence, to be recovered by indictment. Before any person or co-partnership of persons shall receive a license to practice law as herein provided, he or they shall deliver to the collector of the county, in which any such person or persons may reside, a written statement, containing as near as may be, the amount of business done by such person or persons within the twelve months next preceding such application for license as required in the preceding section. The tax on every lawyer's license shall be as follows : when the business done within twelve months next preceding the application for such license shall have amounted to \$500 or less, the sum of \$2. 50," &c.

The power of the general assembly of this State to levy taxes for the purposes of revenue is a general primitive power, cœval with the constitution and inseparable from the exercise of sovereignty. The only restrictions on this power contained in the constitution of this State, are "that all property subject to taxation in this State, shall be taxed in proportion to its value," and that "no tax shall be imposed on lands the property of the United States, nor shall lands belonging to persons residing out of the limits of this State ever be taxed higher than the lands belonging to persons residing within the State." Aside from the foregoing limitations and those contained in the seventh section of the first article of the constitution of the United States, the general assembly of this State have an unlimited power over the subject of taxation.

The law imposing a tax upon lawyers, does not come within either

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of the foregoing constitutional inhibitions, and consequently the legislature did not, in their enactment, violate either of these provisions.

Is the act of the general assembly, in question, retrospective in its operation by imposing a tax on that which was not made taxable at the time; or, in other words, does the act of 1847 operate upon the practice of the preceding year, which was done when no tax existed upon the subject, and thereby become retrospective within the meaning of the constitution? If this were even the case, we are not prepared to say that the general assembly might not legitimately pass such an act; but as we understand the scope and purpose of the act, it is not subject to such objection. The object of referring to the amount of business done in the preceding year was to fix or regulate the tax for 1847; and was the only means by which any reliable data could be obtained of the extent of business which would probably be done in the course of the ensuing year. Our assessments are made in the spring of the year, and the collections in the succeeding fall; hence it would be impossible to fix a tax on the amount of business done, until the year after, otherwise than is done by the statute in question. But the constitutional prohibition last referred to, has no application to the subject of taxation.

Does the law in question impair the obligation of a contract? Can the license to practice law, granted to an individual by a judge of the circuit court, under the law of the State, be construed to be a contract, vesting such individual with rights which the general assembly cannot interfere with? We apprehend it is beyond the power of the most refined sophistry to establish such a proposition. A contract has been defined to be "an agreement upon sufficient consideration to do or not to do a particular thing." (2 Bl. Com. 446.) "An agreement in which a party undertakes to do or not to do a particular thing." (4 Wheat. 197,) a deliberate engagement between competent parties, upon a legal consideration, to do, or to abstain from doing some act. (Story on Con. 1.) None of the essential elements of a contract are to be found in the grant of license to practice law: there is no engagement between the State and the applicant for license that he will follow the practice of the law for a livelihood; no legal consideration is paid the State for the license. The grant of the license is a mere naked grant of a privilege without consideration, and which the applicant may or may not, at his option, avail himself of. Therefore the State may revoke the privilege granted, or may impose such conditions upon its exercise as are deemed proper or demanded by the public interest.

The indictment in its description of the offence, follows the language

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of the statute defining the offence, and is not therefore subject to the objection urged against it.

The other judges concurring, the judgment of the criminal court is affirmed.

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1. A common carrier, upon our western waters, is not responsible for not *drying* merchandize which has been wet and damaged by inevitable accident.

ERROR TO ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

King and Fisher brought their action against the S. B. Lynx, on a contract of affreightment. A parcel of wheat, (880 sacks) was shipped on board the Lynx and her barges, from a place in Illinois, above the lower rapids, consigned to K. & F at, St. Louis. The barge that contained the wheat was brought down in tow by the Lynx, to the head of the rapids. The water was too low for the boat to descend the rapids with her barges in tow, and therefore the barge which contained the wheat, (and other wheat belonging to others) after being lightened by putting 200 sacks of wheat on board of the Lynx, was taken down to the foot of the rapids at Keokuk, in safety, and in the manner accustomed there, and was moored there in the accustomed place, and was staunch and well manned. In the after part of the same day, while the barge was waiting for the Lynx to descend the rapids, a violent storm arose, and forced a great quantity of the water of the river over the gunwale and into the barge, by which a portion of the wheat was wet. Every effort was made by the crew to protect the barge and its cargo from the storm and wetting. The hands worked all night, and part of the next day, to free the boat from water. The storm and wetting of the wheat occurred in the evening and night of Tuesday, and in the afternoon of Wednesday, the Lynx descended the rapids, and taking the barge in tow, ran down to St. Louis in thirty hours, arriving there on Thursday evening, and delivered the freight on the levee next day, Friday.

The time was the latter part of May, and the weather very warm and damp, with frequent rains.

The defendant moved the court for the following instruction :

" If the jury believe from the evidence that the wheat in question was damaged by an unavoidable accident of the river, and not by the negligence of the officers and crew of the Lynx, they ought to find for the defendant, as to the wheat."

Which instruction the court refused to give, but gave to the jury, at the instance of the plaintiffs, the following :

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"It was the duty of the defendant to use all the means in his power to cause the wheat to be dried after it was wet by the storm ; and if the jury believe from the evidence that the wheat might have been dried by the defendant, and he did not do it, then the defendant is liable for all damage to the wheat by reason thereof."

Under this instruction, there was a verdict for the plaintiffs, and a motion for a new trial, which was overruled ; and the defendant brings the case here by writ of error.

GAMBLE & BATES, for plaintiff.

The plaintiff in error, submits, that the court below was in error, both in refusing and in giving the instructions. The boat, it is conceded, was liable as a common carrier, for all damage done to the wheat, not occasioned by the act of God, or the public enemy, and not embraced in the exceptions in the contract of affreightment. 3 Mo. R. 189, Doggett et al vs. Shaw. But here there are two defensive answers.

1st. The damage was evidently done by the act of God ; a violent storm may surely be reckoned as such.

2d. The storm, which caused the damage, was one of the damages of the river, expressly excepted in the bill of lading, which see in the record.

It plainly appears by the state of the record, and by the instructions asked on both sides, that no blame was imputed to the boat, down to the time of the storm and the wetting of the wheat. The only blame imputed is, that the boat did not do all in its power to dry the wheat after it was wet by the storm.

When goods are in the hands of a carrier, and are damaged by a fact or accident, which does not of itself charge the carrier, we deny the principle assumed by the plaintiffs below, and sanctioned by the court there, that the carrier is bound to do *whatever is possible* to repair the damage done, or prevent the effects of the accident. If it had been required to use reasonable care and diligence, such as a prudent man will use with his own property, it might be reasonable and just. But here he is required "to use all the means in his power to cause the wheat to be dried after it was wet by the storm ;" and that too notwithstanding the fact (admitted in refusing the defendants instruction) that it was damaged by an unavoidable accident of the river, and *not by the negligence of the officers and crew of the Lynx.*"

It might have been *in his power* to land the wheat at Keokuk, spread it in a house and dry it by artificial heat. But that would have been an unreasonable service, not contemplated by the general law of carriers, nor by either party to this contract, and would have broken up the voyage, and vacated the policy upon boat and cargo.

The instructions were refused and given, no doubt, in deference to the supposed authority of the case of Bird vs. Cromwell, 1 Mo. R. 58.

In regard to that case, we submit that it does not warrant the course pursued in this case, for the following reasons :

1st. The course of trade and business at that time, was very different from what it is at present. Then navigation was carried on in barges and keels, slowly moved by human power, each cargo was small, and belonged to one or a few persons, and insurance was almost unknown on our river.

2d. The circumstances of the case were widely different from the case at bar. It does not appear in the case, as printed, that Cromwell's coffee was made wet by the accident to the barge. The barge was snagged in the bow ; the coffee was stowed in the stern.

The barge was taken to land in a few minutes, and made only two or three inches of water ; not enough probably to touch the stowage of cargo. Bird, in order to repair the damage occasioned by the snag, raised the bow of his barge, and thus forced all the water aft, where the coffee was stowed. The case does not state how or when the coffee was made wet, but

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leaves the inference irresistible that Bird made it wet himself; not in trying to avoid the danger of the snag or of the river, but in putting his boat in a position to be more easily repaired.

3d. But if the case were exactly like this, then we have to say that it is a harsh and extreme case, that ought to be overruled. It requires the carrier, as a duty, to go to the extremes of possibility, "to use *all the means* in his power," not only to prevent accidents, but when they are unavoidable to cure their defects, and repair their damages. If the goods be sunk in deep water, they might be fished up with the aid of a diving bell. If cotton goods be wet, the captain might open the cases, break bulk, and stretch out every piece to dry. If stained and soiled, he might have them washed and ironed; and if his boat were not a good place to perform this part of his duty, he might go ashore, and hire a house and men to tend it, and buy the needful stores and implements.

All this is possible for him to do, but not without a direct breach of duty to the owners of the boat, and the consignees of the rest of the cargo.

The refusal of the instruction moved by the Lynx, goes this length, and further. It amounts to telling the jury that they should find a verdict against the boat, even though "the wheat in question was damaged by an *unavoidable accident* of the river, and *not by the negligence* of the officers and crew of the Lynx."

It cannot be that this is law.

TODD & KRUM, for defendants, insists :

1st. That the instruction given by the court in their behalf, was according to the law applicable to this case. 1 Mo. Rep. p. 58, new pub., *Bird vs. Cromwell*; Abbott on shipping, p 244.

2d. That the court did not err in refusing the defendants instructions, because the unavoidable accident testified to was the storm, and the plaintiff claimed damages only such as happened to the wheat after the wetting by the storm, but which with proper care and diligence the officers of the boat might have prevented.

This was all the plaintiffs below asked by their instruction; hence there was no occasion for the instruction of the defendants below, and the jury in making up their verdict, evidently deducted a certain sum for the original wetting from the total damages proved.

3d. That the evidence shows it a case of gross negligence. The officers of the boat made no effort to protect the wheat after it was wet, although the weather was hot, and there was plenty of room on the Lynx, for this wheat in the barge was put into the barge from the Lynx. See protest, p. 14, made and sworn to by the two clerks on the day of the accident, and therefore more likely to be correct than their testimony at the trial six months afterwards.

Witness Henderbury, p. 10, testifies that the barge had at least three inches of water in it when unloaded at St. Louis, and that the sacks of wheat were lying in it.

NAPTON, judge, delivered the opinion of the court.

The only question presented by this record, arises out of the refusal of the court to give an instruction asked on behalf of the boat, and the giving an instruction for the plaintiffs King and Fisher. The instruction given was this: "It was the duty of the defendant to use all the means in his power to cause the wheat to be dried after it was wet by the storm; and if the jury believe from the evidence that the wheat

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might have been dried by the defendant, and he did not do it, then the defendant is liable for all damages to the wheat by reason thereof." The instruction refused was as follows: "If the jury believe that the wheat in question was damaged by an unavoidable accident of the river, and not by the negligence of the officers and crew of the Lynx, they ought to find for the defendants."

The doctrine that a common carrier is responsible for all losses, except those occasioned by the act of God, or the public enemy, or such others as are expressly excepted in the bill of lading, has been uniformly maintained in this State. Daggett vs. Price & Shaw, 3 Mo. R. 264. Experience has shown the general results of this principle to be highly beneficial in the main, although, perhaps, its application in particular cases may have been harsh, and we should regret to see any departure from it. But when the carrier is held responsible, not only for every damage not occasioned by inevitable accident, but also for the consequences of such accidents themselves, in cases where any possible skill or labor could restore the value of the property injured, either in whole or in part, the doctrine, it strikes us, is carried to an extent not warranted by the law, and not justified by reason or principle of public policy.

In order to view this matter in a proper light, we must recur to the original and well settled principle—a carrier is responsible for all losses brought about by his own acts, or want of action, for every loss which could have been prevented by human exertion, with the exceptions heretofore stated. If a tempest springs up, or damage from any other quarter threatens, he is certainly to use all proper exertions to prevent loss, and when an injury has been sustained by a cause beyond his power to prevent, to use every means to prevent further injury. A damage may result to the bailment after an injury received from inevitable accident, which, although it would not have happened had not the accident occurred, yet was not necessarily the result of that accident, but might have been avoided by proper efforts on the part of the carrier. For such damage he is undoubtedly responsible, and he cannot charge it to the inevitable accident. It is the result of his own negligence. In the case of Charleston and Col. S. B. vs. Bason, (1 Harper 262, a boat grounded on an inland passage to Charleston, from a reflux of the tide, and fell over, when the bilge water ran into the cabin and injured a box of books belonging to the plaintiff. Richardson, J., said:—"Admitting the grounding to have been accidental and unavoidable, and the carrier in no fault, yet the moment the boat heeled, the bilge water was returned towards the stern; and this the carrier was bound to know, and remove the cargo there

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stored. The books in question, being in the cabin, could easily have been removed. The carrier is liable for bad storage and default in good keeping. The injury therefore was through negligence, and does not come within the exception of the bill of lading."

The true question then, in such cases, must be—is the damage the result of the accident ; or is it, or any portion of it, attributable to the negligence of the carrier. The defendant was certainly not responsible for the damage the wheat received by the storm ; but if, after the storm passed, the wheat, or any portion of it, was suffered to remain in the water, which could have been baled out, or when it could have been removed to another part of the boat, without interference with the rights of other shippers or passengers, a loss happening for want of such removal of the wheat or the water, is properly chargeable to the boat. The loss thus produced is not the effect of the accident, but is attributable to the negligence of the officers and crew of the boat. It is the duty of the carrier to take all possible care of the freight entrusted to him. His employment is to transport goods and passengers with speed and care. But to impose upon him the burthen of repairing the effects of accidents for which he is not responsible, is requiring of him a task he has never undertaken, and for which, we may presume, he has no special skill. The instruction given by the court of common pleas, imposed upon the carrier this additional task. The officers of the Lynx were required to *dry* the wheat which had been wet by a storm, and to use all possible means to effect this object. It will be seen at once that the task of drying several thousand bushels of wheat is not a light one, and if all the means which skill and science, and labor can bestow, are to be used in this process ; the business of the common carrier is lost sight of.

Is the master of the boat to withdraw his crew from their ordinary employments in the prosecution of the voyage, and employ them in this onerous and tedious business, totally foreign to his general duty, and utterly destructive it may be of the interests of the owners, insurers and other shippers. Would it not be most beneficial to all parties concerned, that he should proceed to his port of destination with all possible despatch, where the owners or consignees of the wheat could take the necessary measures for restoring it to a sound condition ? In the case we have cited from South Carolina, it was not hinted in the opinion that it was any part of the duty of the master of the steamboat to dry the books, after they had been wet by the bilge water ; but he was held responsible for not removing them before the water reached them. Sup-

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pose the case of a large assortment of dry goods shipped on one of our western boats. The boat is snagged and the goods are damaged by the water. Shall the master and crew be obliged to open the boxes, unfold the packages and pieces, and by means of artificial or natural heat undertake the tedious process of drying the goods?

The case of *Bird vs. Cromwell*, (1 Mo. R. 81) certainly goes very far to sustain the instruction given in this case. That case was decided in 1821, and the accident which gave rise to the suit occurred on a barge navigating the Mississippi between New Orleans and St. Louis. A quantity of coffee, how much is not stated, was shipped on this barge at New Orleans, and became wet and damaged by an inevitable accident. The court held that it was the duty of the master of the barge to use all possible exertions to dry the coffee. It is impossible to conjecture, from the opinion, what character and degree of exertions the court had in view in giving this instruction. The facts of the case may have authorized a verdict against the boat or her owners, but the instruction approved by the court in its unqualified sense, was certainly imposing an extraordinary duty upon common carriers. Much consideration is no doubt due to the character of the navigation in which the carrier is engaged. Whilst the general principles which govern the conduct of common carriers in ocean navigation, have been applied to the navigation of our western waters, there are cases and circumstances in which the duties of these respective classes of carriers obviously vary. So, also, the navigation of the Mississippi by keels and barges in 1820, may have been attended with different duties from those devolving on the owners and officers of steamboats at the present day. When it required from six weeks to two months to make the voyage from New Orleans to St. Louis, the officers and crew of the barge thus slowly impelled by human power, and having no intermediate points of trade, may have been subjected by the custom of the trade to a greater variety of duties than would now be held to devolve upon the class of navigators which has succeeded them. The abstract principle, however, avowed in this opinion of *Bird vs. Cromwell*, we cannot consider as applicable to the circumstances of the present case.

The other judges concurring, the judgment is reversed, and the cause remanded.

SCOTT judge.

There is no doubt that the master of a boat is bound to take all pos-

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sible care of the cargo, and he is responsible for every injury which might have been prevented by human foresight and prudence and competent naval skill. He is chargeable with the most exact diligence. 3 Kent 213. If, in a voyage on our rivers, a cargo sustains an injury by an inevitable accident, it is the duty of the master to use the most exact diligence to countervail the effects of it. The occurrence of the accident does not relieve him from the responsibilities of a common carrier with respect to the injured cargo. He is still bound to the strictest diligence for the preservation of it, and to use all reasonable exertions to retrieve it from the consequences of the accident. But this is to be understood that such exertions are consistent with the usages of our inland navigation. If a portion of a cargo, consisting of a variety of articles, and belonging to various owners, is injured, will the voyage be suspended to the prejudice of all others, that the injury of the one may be repaired? It is obvious that, in such cases, the conduct of the master must be governed by the circumstances under which he is acting. The instruction of the court would require the master to delay his voyage, go ashore, and take measures for the drying of the wheat. Could the wheat have been dried on board the boat, proper exertions should have been used for that purpose. The instruction of the court, in my opinion, was too broad and indefinite.

THE STATE vs. LACKLAND.

ERROR FROM ST. LOUIS CRIMINAL COURT.

STRINGFELLOW, attorney general for the State.

The indictment is in the words of the statute, and is even more than necessarily full in its allegations.

It is not necessary to specify the particular *case* in which the defendant violated the law. It is sufficient to specify acts which constitute a violation without alleging for whom such acts were done.

State vs. Buford 10 Mo. R.

MORROW vs. THE STATE.

LACKLAND for self.

The court did not err in sustaining the motion. The allegation is too general which is "that the defendant did follow the practice of the law as a business and for a livelihood."

The allegation is not sufficiently definite, vide, Austin vs. State 10 Mo. 591, and Neals vs. State 10 Mo. 499.

The matter of practicing law as a business and for a livelihood, as alleged in the indictment, is a question or conclusion of law which makes the indictment bad. The indictment should state facts, and only facts, which if true, would render defendant guilty. The indictment should allege that defendant practiced law and received pay therefor, and the amount of such pay, and from whom it was received unless he be to the grand jurors unknown.

McBRIDE, judge, delivered the opinion of the court.

This case comes within the principle decided at this term in the case of the State of Missouri against C. C. Simmonds. The judgment of the criminal court will be reversed and the cause remanded for trial in that court.

MORROW vs. THE STATE.**APPEAL FROM ST. LOUIS CRIMINAL COURT.**

LESLIE for appellant.

We contend that it is undeniably true that this case is in every essential point like the case of Jacob Hawthorne vs. the State, and the opinion of the court in that case is a true and clear exposition of the law, fully sustained upon general principles, and the case of the State of Delaware vs. Phalen & Pain 3d Harrington R. 452.

By the act of the 26th day of February, 1835, all the powers to contract for the drawing of this lottery, that belonged to the Hospital Lottery was conferred upon it, and up to the time of the law of 19th Dec., 1842, repealing all laws authorizing the drawing of any lottery, there was a vested right by contract in Gregory which that act could not impair.

McBRIDE judge delivered the opinion of the court.

LEE and others vs. MURRAY.

This case is similar to the case of the State vs. Jacob Hawthorn, decided by this court, and reported in the 9 Mo. R. 389. The judgment will be reversed.

LEE AND OTHERS vs. MURRAY.

1. A joint owner of a steamboat is a competent witness against the other owners, to prove the joint ownership and tortious acts committed by them.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.**STATEMENT OF THE CASE.**

This is an action on the case brought in the St. Louis court of common pleas to the September term, 1846, in which the appellee plaintiff below obtained a verdict against the appellants defendants below for \$541 92.

The appellants moved to set aside the verdict, assigning for reasons the admission of incompetent evidence, and the other ordinary reasons for a new trial. But the court below overruled this motion and rendered judgment for the appellee, and the appellants, defendants below, appealed to this court.

The first count in the plaintiffs declaration states in substance that the appellants being the owners with one John P. Moore, of the steamboat Brunswick, authorized said Moore to sell the bar of the boat to appellee, for the sum of \$500 in cash, and \$300 to be paid upon request. That appellee thereupon took possession, and furnished and used the said bar. And that on the 20th of May, 1846, the appellants with intent to injure appellee, wrongfully removed him from and took the possession of said bar themselves.

The second count states that the appellee being lawfully possessed of the bar of said steamboat and entitled to keep therein, and to sell such articles as are usually kept and sold by barkeepers on steamboats, and from the sale of which he derived large profits, the appellants, on the 20th of May, 1846, did wrongfully enter into said bar and removed the property of appellee therefrom, and hindered him from having possession and enjoyment thereof.

The third count is in substance the same as the second.

The fourth count sets out that the appellants together with one John P. Moore, on the 1st day of August, 1844, being owners of the steamboat Brunswick, were desirous to sell the bar of said boat, and that appellants on 1st August, 1844, offered the same to the appellee and deceitfully represented to him that said steamer would be employed as a packet boat between the city of St. Louis and the town of Brunswick, on the Missouri river, and the appellee confiding in said representation, that said steamer would be so employed, did purchase the bar thereof at and for the

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price of \$800. But that said appellants contriving to injure appellee, immediately after and ever since, employed said boat in running between St. Louis and New Orleans, in La.

It is also averred that the profits accruing to the barkeepers of such boats as are employed in running between St. Louis and Brunswick are much greater than of those plying between St. Louis and New Orleans, and that in consequence the appellee suffered damage.

The issue was upon the plea of not guilty. On the trial the appellee, without having given a release to the witness, offered the deposition of John P. Moore in evidence, to prove the sale of the bar of the steamer Brunswick to himself, it appearing upon the face of the deposition that before and at the time of such sale, said Moore was a joint owner with appellants of said steamboat, but that he had sold out his interest before the putting the appellee and his goods off the boat.

To the admission of this deposition appellants objected, but the court below overruled the objection and allowed the deposition to be read in evidence, and the appellants excepted.

Afterwards appellee produced one J. W. Allen as a witness, who stated on his voire dire that he had no interest in the result of this cause, and then he was sworn to testify as a witness on the part of the appellee. After he had proceeded awhile in his testimony, he stated that on the 9th of May, 1845, he became a joint owner with the appellants and John P. Moore, of the steamer Brunswick, and that he continued to be such joint owner, until the month of November, 1846, when he sold his interest to Jas. W. Finney.

At this point the counsel of appellants objected to said witness' being allowed to testify further in the cause, and also moved the court to instruct the jury that the testimony of said witness already given was illegal and ought to be disregarded by them, which objection and motion the court below overruled, and the appellants excepted and appealed.

Plaintiff below offered evidence tending to prove the disturbance of Murray in the enjoyment of the bar by defendants below.

POLK for appellants.

1st. The main question in this case arises upon the allowing by the court below of the deposition of John P. Moore to be read in evidence to the jury—the question upon the admissibility of the witness Allen, being exactly the same.

The fourth count of the declaration, though in form a count in case, is in truth based upon a contract between the parties for the sale of the bar of the steamer Brunswick. Just as an action on the case may be, and often is, brought against a common carrier, when an action of assumpsit might also have been sustained, or an action on the case for deceit in case of false warranty, when an action might have been brought upon the contract.

My first proposition is, that when a party may upon a given state of facts maintain an action of either case or assumpsit, the rules of evidence are the same in either form of action.

He cannot change the rules of evidence by changing the form of the action. Upon the same state of facts between the same parties, the rules of evidence remain always the same, whatever may be the form of the action. The scope and amount of evidence may be varied by changing the form of the action, but not the rules governing the introduction of the evidence and its admissibility.

So too, a change of the form of the action may change the name of the defence. (1 Chit. Pl. forms of action,) but never the rules of evidence.

2d. Now if this action had been assumpsit for the breach of the contract made when the bar was sold, that the boat should run between St. Louis and Brunswick, it can hardly be denied that the deposition of Moore would have been incompetent and illegal,

The plaintiff below to make out his case, would have been compelled to prove the contract

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and its breach, and also that it was made with the defendants. The witness he introduced for the purpose of proving that the defendants were owners of the Brunswick, and as such, had entered into the contract for the sale of the bar, was himself an owner of the boat jointly with the defendants. Now the witness Moore, being a joint owner of the boat, could not be competent to prove that the defendants were joint owners, in order thereby to subject them to a recovery. *Hood vs. Dixon* 7 Mo. R. 414. *Purviance vs. Dryden* 3 Serg. & R. 89.

The above two cases are where the witness decided to be incompetent, was a co-partner with the defendant.

The rule is the same where the witness is a joint owner with the defendant. And in the case of *Marguand vs. Webb*. 16 John R. 89, the witness and defendant were joint owners of a ship ; in the case at bar the witness and the defendants were joint owners of a steamboat.

3d. If the deposition of Moore was incompetent as to the 4th count, it ought to have been excluded altogether. It could not go to the jury under any count. If competent as to the other counts, the plaintiff might have availed himself of it by the withdrawing the 4th count, but this was the only mode in which it could have been done. For if it was incompetent for any purpose, or to any extent or upon any part of the declaration, it ought not to have been read to the jury. Just as when incompetent evidence has been admitted to go to the jury, there has been error, for which the judgment will be reversed, even though there may have been other and competent evidence to the same point sufficient to have justified the verdict. See the above case of *Marguand vs. Webb* 16 John R. 89.

GANTT for appellee insists.

1st. That the injury complained of in the three first counts was to the possession of Murray, and is complained of as a tortious act, and therefore it has no connexion with the title derived from defendants and Moore, at the original sale of the bar.

2d. That there can be no contribution as between wrong doers, and therefore even if King & Fisher alone had been sued though charged to have committed the tort jointly with Lee, the plaintiff below might have used Lee as a witness. 3 Carr and Payne 172; 4 Carr and Payne 7; 1 Term Rep. 301; 14 Johns 318; 4 T. R. 17; 3 T. R. 27, 36; 1 Phil. Ev. 47 to 55 inclusive. Much more then was Moore a competent witness.

3d. Moore is not charged by the declaration to have had any participation in the tort complained of by Murray. He was not even a joint owner of the boat at the time of the commission of the tort charged in the three first counts. He was therefore in no way liable for them or their consequences.

4th. No breach of the original contract is complained of. It is the foundation of plaintiffs action, that a valid contract of sale was executed to him. The breach assigned is the unlawful disturbance of his rights by defendants, not by defendants and Moore jointly.

5th. The bill of exceptions does not profess to set out the whole of the testimony, and in fact does not do so. Even if the doctrine of contribution had application, it would only have the effect of making those liable to contribution incompetent to prove the joint liability of third persons. *7 Mo. R. Dixon*,

Now it is perfectly consistent with the record that this was proved *aliunde* or admitted by the parties. The joint ownership of the boat by Moore and defendants may have been either established by other testimony, or admitted by the parties.

6th. The fourth count does not charge that Moore had any thing to do with the fraudulent representation complained of by Murray, and which he charges against Lee, King & Fisher, neither does it allege any participation by him with the breach of the promise and assurance charged to have been deceitfully made by Lee, King & Fisher. Here also the injury complained of is a tort, in respect of which even the joint wrong doers are not liable among each other to contribution. At

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the period of the making of the fraudulent representation, Allen was not an owner, and could not have been a party to the deception. It is therefore submitted that neither Allen nor Moore had any interest in the result of the suit, and were therefore competent witnesses.

NAPTON, judge, delivered the opinion of the court.

Under the first three counts, we are well satisfied that Moore was a competent witness. It is not charged in either of these counts that Moore was a partner when the tortious expulsions was committed, and whether he was a partner or not, he could not be held responsible for the tortious acts of his co-partners, in which he had no participation.

The fourth count presents more difficulty. In that a deceitful misrepresentation is charged upon the defendants, resulting in a pecuniary loss to the plaintiff. Moore, the witness, was a partner with the defendants when this misrepresentation was made. Moore proved the misrepresentation (if any were proved at all) and also proved the partnership. Now if the witness admitted the representation or deceit, and proved the partnership, he might be objectionable on the principle acted on by this court in Dixon vs. Hood, 7 Mo. R. Admitting himself to be liable, he would be testifying in such a way as to make others share his responsibility.

The distinction has not been sufficiently noted, in my humble opinion, in many of the cases on this subject, between the competency of a witness against whom a judgment by default has been rendered, and one who is not a party to the suit. In the former, the witness' liability is fixed, and when his testimony is calculated to divide that responsibility, his interest in favor of the plaintiff is manifest. But where the witness is not a party, and he neither admits nor denies the liability of the defendants, but is simply called on to prove their partnership with himself, he is certainly testifying against his interest. He is facilitating a recovery for the plaintiff, in which event, he admits himself liable over for contribution. His interest is directly against the party calling him.

In this case we will observe that the deposition of the witness Moore, was objected to generally as incompetent. There are portions of his testimony applying solely to the three first counts, which were clearly admissible, and if other portions were objectionable under the fourth count, they should have been pointed out, and a separate exception taken.

It will strike any one who reads the deposition of Moore, which was

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a long one and contained nearly all the evidence in the case, which was to the point disputed, that scarcely any plausible case of deceitful misrepresentation, as charged in the fourth count, was made out. But both parties went to the jury without instructions, preferring, no doubt, to take their chances with that tribunal for a correct decision of the law and the facts. This they have a right to do : but the losing party in such cases has no cause of complaint in this court. We have no further control over the matter.

We think the witness, Moore, was competent, although there are portions of his testimony about which we have doubts ; but as the objection was a general one, and cannot be sustained as such, the judgment will be affirmed.

SCOTT, judge.

The case of Dixon vs. Hood is not applicable. In crime and fraud there is no partnership, and consequently there can be no contribution. The fourth count in the declaration is for a fraud, and a recovery under it would lay no foundation for a claim to contribution among those who were parties to it.

When, in the trial of a cause, evidence is offered which is admissible for one purpose, but incompetent for another, it is the duty of the court to receive it, and the party against whom it is offered may move the court to direct the jury as to the purposes for which it is incompetent. Palmer vs. Hunter 8 Mo. Rep. 517.

MEAD AND BEEKMAN vs. KNOX.

1. Complainants filed their bill to compel defendants to re-assign a leasehold interest in real estate, which they had absolutely assigned to defendant. The supreme court approved the action of the circuit court in dismissing the bill without prejudice.

APPEAL FROM ST. LOUIS CIRCUIT COURT.

MEAD & BEEKMAN vs. KNOX.

GOODE & GLOVER, for appellants.

1st. That though the transaction mentioned in the pleadings, may appear upon its face in the assumed character of an absolute sale, yet the testimony proves that at the time it was intended by the parties, and was merely a mortgage for the security of advances made by the defendant, and the court will so treat it, it being a question of fraud.

2d. That the paper purporting to be signed by one of the complainants, giving the transaction another and different character from that asserted in the bill, cannot be viewed by this court in its weight of testimony, as testimony, because it is the admission of one partner against his co-partner, after the dissolution of partnership. *Baker vs. Starkpoole*, 9 Cowan, 433; *Chapin vs. Coleman*, 11 Pick., 331; *Hopkins vs. Banks*, 7 Cowen, 650; *Wiggins vs. Hammond*, 1 Mo. Rep., 121; *Owings vs. Loid*, 5 Gill. & John, 136.

3d. Nor can the court view it in any aspect, or as proving a want of interest in one of the parties, complainants, in the subject matter of the suit so as to justify the court below in its dismissal of the bill.

4th. A court of equity never dismisses a bill for want of proper parties, nor

5th. As a necessary corollary for joinder of improper parties'

6th. If the question could be raised before the court at all in this manner, the proper course of the court below was to have allowed the complainant Garrett, T. Beekman, an opportunity for amendment. *Lloyd vs. Makeam*, 6 Vesey's, Chy. Rep., p. 144; *Greene vs. Poole*, 5 Browns cases in parliament, p. 504.

7th. If there was a want of interest in any one of the complainants, the defendant, if the defect appeared upon the face of the bill, should have demurred, or if not, should have pleaded the fact, or in any event he should have insisted upon it specifically in his answer by way of defence.

8th. It is too late at the hearing to start the objection that some or one of the complainants have no interest in the subject matter of the suit. *Wilkinson vs. Perry*, 4 Russ. 272. *The E. J. Company vs. Baldwin*, 9 Vesey Jr., 467.

9th. The court should have gone on, and decreed as to the complainant Garret T. Beekman, if as the decree of the court below admits, there was equity in his bill. Story's Equity Pleading, Sec 544, 542.

10th. This feature of the case can only be viewed by the court as a release by the complainant Alped Mead, to the defendant, and the rule is, that one cotenant cannot, by a release to a defendant, abate the bill of complainant filed by a joint tenant, jointly with himself. 2 Freem. 6, cited in Edward's parties in chancery, p. 45.

11th. If the court is not satisfied that the court below should have gone on, and decreed for the one complainant, still the decree should be reversed for the purpose of enabling the complainant Beekman to amend his bill, by making his co-complainant a defendant, and bring his bill to a hearing upon the new state of facts presented by the evidence.

GAMBLE & BATES, for appellee.

1st. The bill admits that the written contract between the parties is in terms absolute and final, and not conditional, nor provided as a security only, and sets up only a private verbal understanding, against the terms of the written contract, and positively denies any such verbal understanding, and the answer is not rebutted by any sufficient testimony. If this be so, it disposes of complainants case, as to what is sufficient testimony to rebut the answer. See 9 Mo. R. 226, *Gamble et al vs. Johnson*.

The rules of evidence at law and in chancery are the same.

It is not competent to show, by parol evidence, that a deed absolute in its terms was inten-

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ded to be conditional, without showing also fraud, accident or mistake, in obtaining the deed. 10 Mo. R. 488, Hozel vs. Lindell; also 10 Mo. R. 506, Montgomery vs. Rock.

2d. The affidavit and disclaimer of the complainant Mead, as evidenced, is conclusive against the equity of the bill. 7 Mo. R. 386, Dillon vs. Choteau.

It is not as Beekman's counsel supposes, an admission of a copartner, after dissolution; but a solemn declaration of a joint contractor and joint plaintiff, denying the only allegation in the bill, on which a claim of equity could be maintained, and in this particular concurring with the answer. If Mead's declaration be no evidence, neither would a similar declaration by Beekman, and so both might recover, against the sworn declaration of both, that they had no honest claim!

Certainly Mead's declaration would be good evidence against himself, and therefore the court could not reject it; and the bill does not set up any separate contract or understanding by Knox with Beekman alone.

3d. The record presents no question as the misjoinder or non-joinder of parties. If the subject matter were truly stated in the bill, then the parties were right. It is only because the defendant and one of the plaintiffs deny the truth of the bill, that the other complainant thinks there is something, wrong about the parties.

The defendant has never raised an objection that *one* of the complainants had no interest in the subject matter. On the contrary, the objection was, and is, that there is no subject matter in which all or any of the complainants had a valid interest against the defendant.

4th. The claim of Beekman's counsel that Mead's affidavit ought to be considered a *release*, we think a mere error in fact. It does not profess to discharge an existing obligation, but is a simple denial of the existence of any such obligation.

5th. The decree is right in all respects, except that it is too lenient in dismissing without prejudice as to Beekman.

NAPTON judge, delivered the opinion of the court.

This was a bill in chancery to compel a re-assignment of a leasehold interest in St. Louis lots, assigned by the complainants to the defendants.

The complainants were partners in purchasing a leasehold interest in a lot of ground in St. Louis, and in erecting buildings thereon. Becoming embarrassed in the progress of their buildings, they applied to the defendant Knox for assistance. Knox made several advances to them, endorsed their notes, and they finally executed to him an assignment of the lease. This assignment was absolute on its face, but the complainants allege that it was understood at the time of its execution among all the parties, that it was to be re-assigned so soon as Knox reimbursed himself for the money he had advanced. This understanding, it is further alleged, was to have been reduced to writing, but from some cause was neglected. To enforce this agreement, and compel a re-assignment of the lease, is the object of the bill.

The defendant insisted upon the assignment as absolute.

At the hearing, evidence was given by the complainants to establish

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the allegations of their bill ; the defendant read an affidavit of Mead, after proving his signature, to the effect that the assignment from Mead and Beekman to Knox, was absolute and unconditional ; that there was no understanding or agreement, that Knox should reconvey, or any understanding that such agreement to recovery should be reduced to writing.

Evidence was given on behalf of the complainants to destroy the credibility of this affiant.

The circuit court dismissed the bill without prejudice to Beekman, and from this decree Beekman has appealed.

We have not entered into the details of the bill, answers and evidence, because it is obvious that the merits of the case, so far as Beekman is concerned, have not been determined by the circuit court, and cannot be determined here. The circuit court dismissed the bill without prejudice to Beekman.

It is contended that this decree is erroneous, on the ground that Mead's affidavit merely amounted to a disclaimer of interest on his part, and that it was no ground for dismissing a bill at the hearing ; that there were not proper parties, or that improper parties were joined. We do not view the action of the circuit court in this light. The affidavit of Mead was at least evidence against himself. That defendant distinctly denied any material allegation of the bill. No application was made to the court for leave to amend and make Mead a party defendant, and it was impossible for the complainants, or either of them, to have a decree upon the allegations of the bill as they stood. It cannot be pretended that Mead was entitled to a decree against his own affidavit, and it is not easy to see how Beekman could have a decree upon the bill as it stood.

The bill charges that the complainants were partners in this purchase of leasehold property ; that as such partners they made the assignment to Knox, and as such they were entitled to a reassignment ; and the prayer of the bill is, that the lease be reassigned to them. It is not denied that a court may grant, under the prayer for general relief, a relief different from the specific relief sought ; but the decree must be warranted by the allegations and proofs. The testimony of Mead put a new face upon the transaction ; it was conclusive against any relief to him, and if there was a fraudulent combination between him and the defendant, it was proper that the bill should be modified to suit this altered state of things. The circuit court would doubtless have per-

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mitted an amendment, but this was not asked, and the least which the court could do was to dismiss the bill without prejudice to Beekman.

It will be observed that there was no evidence to show that Beekman and Knox had ceased to be partners. The partnership was no doubt considered at an end by Mead, as it only extended to the mutual interest of the complainants in this leasehold property, and as the property had been, according to his statement, unconditionally disposed of, the partnership of course ceased. But there is nothing in the affidavit of Mead, or in any other testimony, showing that Mead had sold his interest to any other person than Knox. If the allegations of the bill were sustained against the affidavit of Mead, the partnership continued, and Mead was entitled to the benefit of the decree sought. There is no disclaimer of interest on his part in the subject matter of the suit, but a statement that neither he nor his partner had any interest in the leasehold property, and that they had sold it unconditionally to the defendant. It may well be questioned, then, whether Mead's testimony would be liable to the objection, even as against Beekman, of confessing away the rights of his co-partner after dissolution. His interest had not ceased, any more than that of Beekman. The falsity of his affidavit, if it be false, must be put upon the ground of a fraudulent combination with the defendant.

There was some evidence on this subject, but there was no allegation in the bill to which such evidence could be applied.

The other judges concurring, the decree is affirmed.

MARKHAM vs. DOZIER & PANCOUST.

1. A boat cannot be sold under an execution issued by a justice of the peace under the act of March 26, 1845, concerning boats and vessels.

ERROR TO ST. LOUIS COURT OF COMMON PLEAS

MARKHAM vs. DOZIER & PANCOURT.

TODD & KRUM for plaintiff.

The 23d section of the act "concerning boats and vessels," gives jurisdiction to justices of the peace in cases under said act, when the demand shall not exceed ninety dollars.

The 24th section directs that the proceedings in all suits before justices of the peace under said act, "shall conform to the law governing justices courts, and as nearly as may be to the provisions of this act as applying to the circuit courts, but no justice of the peace shall have power to order the sale of any boat or vessel as provided for in the 11th section of this act."

1st. The statute conferring jurisdiction and affording a remedy not known to the common law, will be construed strictly, and justices of the peace under the act concerning boats and vessels, can exercise no powers which are not expressly conferred by said act.

2d. The "proceedings," which by the 24th section of the act are required to conform to the law governing justices courts, are such only as relate to the commencement and prosecution of a suit to final judgment, and not to any proceeding subsequent thereto.

3d. The prohibition in the last clause of the 24th section, manifests the intention of the legislature in respect to ordering the sale of a boat or vessel. The power to order a sale is given to courts of record by the 11th section.

4th. The manifest intention in giving jurisdiction to justices was to allow parties holding small claims to liquidate them in final judgments with little cost, but it was not intended that justices of the peace should order the sale of a boat or vessel after judgment, nor is the power to do so any where given.

5th. The act concerning boats and vessels contemplates as well as provides in terms for the classification of all demands with a view to a proper distribution of the nett proceeds arising from the sale of a boat or vessel to the several claimants according to priority or classification under said act.

The jurisdiction given to justices of the peace is nothing more than a convenient mode of ascertaining the amount and nature of claims with a view to their classification under 14, 15 and 16 sections of the act.

HAIGHT for defendants.

The persons interpleading claim under judgment of a justice and the only question is whether under such a judgment a sale can be had and good titles pass. S. 23 24, p. 185, 186, do not seem to admit of any doubt on this question.

NAPTON, judge, delivered the opinion of the court.

The only question in this case is, whether a boat can be sold under an execution issued by a justice of the peace, under the act of March 26, 1845, concerning boats and vessels.

The act of 1845 is a revision of all the previous laws on the subject, and is designated to effect several important changes. One of the principal difficulties which existed under the former laws was the uncertainty of the titles acquired under execution sales by virtue of the different grades of liens. So far as proceedings in the superior courts are

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concerned, this last act obviates all difficulties arising from this source, three classes of cases are provided for: first, where a boat is attached and the owner or some person for him gives a bond to satisfy the debt and costs, the vessel is discharged from the lien and the case proceeds solely against the obligors. Second, where a bond is given for the forthcoming of the vessel, at a time and place specified, the boat is discharged, but not the lien, and a special fieri facias is given to attain the objects of the judgment. Third, when neither of these bonds is given within a specified time, the boat is treated as an insolvent individual, and goes into liquidation, an order of sale is procured and provision is made to bring in all the creditors and distribute the proceeds according to the priority of the liens. This latter proceeding avoids all the questions which arose under the former laws, and gives an unquestioned title to the purchaser, whilst it secures the most advantageous sale of the boat.

But the act proceeded to give jurisdiction to justices of the peace, where the amount claimed did not exceed ninety dollars. This provision is copied from the act of 1835. It is declared that in suits of this character, the proceedings shall conform to the law governing justices courts, and as nearly as may be to the provisions of this act, as applying to the circuit courts, but that no justice of the peace shall have power to order the sale of any boat or vessel, as provided for in the eleventh section.

It is further provided that warrants issued by justices shall be returnable forthwith, and that upon the return the justice shall hear and determine the complaint in a summary manner. By recurring to the ninth and tenth sections of this act, it will be seen that the bonds provided for in those sections, were intended to be allowed as well in suits before justices of the peace as in those prosecuted in the superior courts.

The ninth section in speaking of the character of the bond, says it must be approved by the court, or the judge or clerk in vacation, or *the justice of the peace before whom the action may be pending.*

The tenth section provides that a bond may be given to the sheriff *or other officer* having custody of the boat, obviously including constables, as officers empowered by the act to take a forthcoming bond, so that it cannot be inferred from the act, that the proceedings under the 11th section, which is to take place in all cases where no bond is given, as provided for in the ninth and tenth sections is confined to suits in the superior courts. It is true that the justice is expressly prohibited from

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ordering a sale of the boat under the provisions of this section, and if the judgment of the justice is to be executed by any proceeding under his control it must be by an ordinary execution. But if this be allowed, it is obvious that one of the most important objects of the act is defeated. If, in a case where no bond is given, the justice may not only proceed to hear and determine the case, but issue an execution and have the boat sold, without regard to other judgments, or other liens, all the confusion and uncertainty and useless sacrifice which it was the main purpose of this act of 1845 to prevent, is suffered to remain in the most objectionable form : on the other hand, there are certainly objections to any construction of these sections (22 and 23) which will not allow an execution.

The master or agent of the boat attached is allowed five days to give bond, and yet under the provisions of the act which gives jurisdiction to the justices courts, the proceedings are all concluded the same day. Besides this, it may be thought singular that such a jurisdiction should be given merely for the purpose of liquidating the claim, without allowing the plaintiff to take out his execution. Other difficulties have been suggested, and we are not now called upon to reconcile all those apparent inconsistencies or difficulties of the act. The act may be imperfect in this particular, but we feel authorized to disregard these minor objections to that construction of the law which refuses the execution, in view of the paramount importance of the provisions of the eleventh section.

The order of sale by a superior court, and the distribution of the proceeds in a manner to which there can be no objection, together with the unembarrassed title which this proceeding gives, must be regarded as the primary and leading object of the law. To such an object provisions of minor importance must yield, if they cannot be reconciled with the object. No argument is necessary to show that to permit a constable to sell under an execution, in a case where no bond has been given, would very much impair the efficiency of the general system which the act contemplates. The failure to give security on behalf of the boat, in cases of these small debts within a justice's jurisdiction, carries a stronger implication of impending insolvency than it would where the suits are for larger sums. In the latter case, the superior courts are not allowed to issue executions, but an order of sale must be procured and the other directions of the eleventh section must be followed. It would be strange if after taking these precautions, the legislature would still permit a justice of the peace to issue an execution in such

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cases, when the power is expressly taken from the circuit court. We do not believe that this was the intention, and in declaring that the proceedings before justices should conform as nearly as may be to the general scheme of the act, we suppose an execution was designed to be prohibited.

The other judges concurring, the judgment is reversed.

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1. Appeals from justices of the peace, in the county of St. Louis, should be taken to that court whose sittings commence first after the appeal, having jurisdiction to try the case at that term.

APPEAL FROM ST. LOUIS CIRCUIT COURT.

LESLIE & LORD, for appellant.

The only question presented by this case, is: Did the circuit court err in dismissing the appeal?

The third sub. of the first section of the act of 1841, establishing the court of common pleas for St. Louis county, gave to that court exclusive appellate jurisdiction from judgments rendered by justices of the peace. See Laws 1841, p. 50.

The second section of the act of 1843, amendatory of the abovementioned act, gave to the court of common pleas, and to the circuit court, concurrent appellate jurisdiction from judgments of justices, and directed that the justice from whose judgment an appeal should be taken, should, on or before the first day of the circuit court, or court of common pleas, as the one or the other court might be held next after the appeal should have been allowed, file in the office of the clerk of said court, the transcript, &c., and that such court should proceed thereon, &c. Laws 1843, page 56.

The General Assembly, in 1845, passed an act entitled "An act to establish a court of common pleas in the county of St. Louis," by the first section of which it is enacted, that a court of record, to be "called the S. Louis court of common pleas, *is hereby established*," &c. &c. R. S. p. 314. And by the second section of the same act, concurrent appellate jurisdiction is given to the circuit court and to the court of common pleas from the judgment of justices, but does not provide, as in the act of 1843, that the appeal shall be taken to the court which sits first after the appeal shall be perfected. R. S. page 315.

By the act of 1845, concerning justices courts, it is provided that all appeals allowed in

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days before the first day of the term of the circuit court next after the appeal allowed, shall be determined at such term, &c. R. S. 670, sec. 20.

Sec. 20, of an act concerning the revised statutes, provides that all acts of a public, general and permanent nature, revised at the present session, &c. So soon as such acts shall take effect, shall be construed as repealing the acts in force at the commencement of the present session.

Sec. 20 A. S. page 699

Sec. 22d of the last mentioned act, provides: that all acts specially applicable to the city or county of St. Louis, in force at the commencement of the present session, &c., and not repealed or modified by some act of the present session, specially applicable to said county or city, shall be continued in force. Sec. 22 R. S., page 699.

These, it is believed, are all the acts of the assembly bearing upon the question, and we think under the law as it stands, that the circuit court erred in dismissing the appeal, because

1st. A party asking redress either by the commencement of an action, or by appeal from an inferior court, when there are two courts having concurrent jurisdiction, may elect the forum where he will commence his suit, or try his appeal.

2d. The appeal was properly brought, and the transcript and papers properly filed by the justice with the clerk of the circuit court.

The appeal was taken on the third day of February, and the common pleas commenced its session on the 7th on the same month, so that only four days elapsed between the time of taking the appeal and the commencement of a session of the common pleas, and as the appeal was not taken ten days before such session of the common pleas, a trial could not have been had until the ensuing September term; but the appeal was taken in time for a trial at the April term of the circuit court, (the term at which the case was dismissed,) so that in fact the case could have been sooner tried in the circuit court than in the common pleas.

The act of 1843, was in fact repealed by the act of 1845; from the moment the act of 1845 took effect, every act concerning the St. Louis court of common pleas, prior in date to that, was repealed, and this by every rule of construction known. A new court was erected; the old court of common pleas was dead. Nor does section 22d of the act concerning the revised statutes, page 699, help the defendant in error out, for that section only preserved such acts as were not repealed or modified by some act of that session, and we think that the acts of 1841 and 1843 were repealed by necessary construction of the act of 1845, and if not repealed, then we say that the 2d section of the act of 1843, conferring jurisdiction, was modified by the 2d section of the act of 1845, and consequently of no force.

GRAY, for appellee, insists :

That the court below committed no error in dismissing the appeal; for by the act of 1843 the appeal from a justice of the peace in St. Louis county, is to be taken to the circuit court or court of common pleas, whichever shall first sit after the taking of the appeal. See act of February 17 1843, sec. 2 acts p. 56.

This being part of an act specially applicable to St. Louis; and not repealed or modified by any act in the code of 1845, is still in force. Revised Laws 1845, p. 699.

If the foregoing view be incorrect, still by the provisions of the laws of 1845—title justices' courts, act 8 sec. 12, the justice is required, on or before the first day of the court *next after* an appeal, to file his transcript with the clerk of such court, and the court is then possessed of the cause. Revised Laws 1845, p. 669.

The court *next after the appeal* in this case, was the court of common pleas.

That court consequently had the exclusive jurisdiction of this particular appeal, and the same was properly dismissed from the circuit court.

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NAPTON, judge, delivered the opinion of the court.

This action was originally brought before a justice of the peace, and was determined before the justice on the 3d February, 1848.

An appeal was taken, and the transcript filed in the St. Louis circuit court, which court commenced its sittings on the 17th April, 1848. The common pleas sat on the 7th February 1848. The appeal was dismissed from the circuit court, on the ground that it should have been taken to the common pleas.

The circuit court and common pleas in St. Louis, have concurrent jurisdiction in cases of appeals from justices' courts. All appeals allowed ten days before the first day of the term of the appellate court next after the appeal allowed, are decided at such term, unless continued for cause. This is a general provision regulating appeals from justices courts, applicable as well in St. Louis county as elsewhere. The act of February 17th, 1843, which was confined in its operations to St. Louis county, directed that the justice, from whose judgment an appeal was taken, should, on or before the first day of the circuit court or court of common pleas, as the one or the other might be held next after the appeal allowed, file in the office of the clerk of said court the transcript &c. By the general law regulating justices courts, passed in 1845, the justice is required, on or before the first day of the court next after an appeal, to file his transcript with the clerk of such court.

We do not think it important to inquire whether the act of 1843 was repealed by the subsequent enactments in the revised code of 1845, as we should put the same construction upon either law. The object of the provisions referred to in the act of 1843, and the one contained in the revision of 1845, is obviously to expedite the settlement of these appeal cases, at as early a period as would not be inconsistent with a reasonable time for preparing the papers and the testimony for trial. The appeal is not to be tried within ten days from the time it is taken in any case; but after the lapse of that time, which was doubtless thought sufficient for the purpose above suggested, it is to be tried at the first term of the court to which it is taken, and in St. Louis, it is to be taken to that court where a trial may be first had. This is the spirit of the law of 1843, and the appellant evidently complied with its spirit and intention, by taking his appeal to the circuit court, although the common pleas held a session before that of the circuit court, and after the appeal was granted. As the session of the common pleas commenced within the ten days after the appeal, the case, if taken to that court, could not

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have been tried until the second term, whereas, by taking it to the circuit court, it was triable at the first term, and this term commenced months before the second term of the common pleas. The law is, as we understand it, that the appeal shall be taken to that court whose sittings commenced first after the appeal, having jurisdiction to try the case at that term.

The other judges concurring, the judgment is reversed and the cause remanded.

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1. If an execution is regular upon its face and emanates from a court having jurisdiction of the subject, it will justify an officer in making a levy. He is not bound to go behind the writ and inquire whether the judgment upon which it issued is regular.

ERROR TO ST. LOUIS CIRCUIT COURT.

CARROLL for plaintiff.

The only question in this case is, will an execution confessedly without any judgment to support it, justify an officer who seizes and sells property in virtue of it.

I concede the authorities go to the extent of saying that if an execution is sound on its face, and the court be a competent court to try the cause, a simple exhibition of his writ, without any thing offered to rebut it on the other side, is conclusive for his defence. But there is no case on record which is known to me, or within the reach of my investigation, which will go so far as to justify an officer in taking property, under a writ, that is an absolute nullity.

In the case now at bar, the so called writ was a mere blank piece of paper. That it had the *form* of a writ, and was called by that *name*, is hereby sufficient to make it a writ. This so called writ recites a *falsehood*, it recites or undertakes to recite a judgment which never was reversed, and which has no existence except in the imagination of the man who wrote it. This was admitted at the trial, and the bill of exceptions shows the fact to be so. Can it be that a paper confessedly without any legal existence, utterly and absolutely void, can it be that such a paper will warrant the seizure and sale of property of a man against whom no judgment has been rendered, who has never any notice, who was never called into court to answer the case, and no means of defence against it whatever? Can this be *law*? Can there be any such sanctity attaching to the mere forms of the law as entirely to subvert its substantial aims and ends?

In law, names are not things. It could be said with as much propriety that a child came into

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the world without any mother, as to say that an execution can exist for any purpose, that has no judgment to support it. The very idea is absurd.

GAMBLE & BATES for defendant.

And so the only question is, whether or no the execution alone, without the judgment, is a defence for the sheriff. We insist that it is.

The sheriff is protected in executing all process regular *on its face*, and emanating from a court having legal jurisdiction of the subject.

1 Mo. Rep. 134; Brown vs. Henderson 4 Mo. R. 1, 3; Benton vs. Seveny Ib. 37, 8; Mitchell vs. Gregg 9 Conn. R. 141; Watson vs. Watson 12 Wend. R. 96; 16 Wend. 562; Earl vs. Camp.

But even in cases where a sheriff might be liable for an abuse of his powers, still *trespass* will not lie against him for a wrong done under regular process.

9 Conn. R. Sup.; 10 Mo. R. 151, Ivy vs. Barnhart.

If the execution were indeed irregular, by the clerk's mistaking the name, *Carter*, for the true plaintiff, it was Higdon's business to move to quash it, for that irregularity (and then the judgment, plaintiff might have his counter motion to amend it.) He could not take advantage of the irregularity in a collateral way, even against a private person not a party to that record, much less a sheriff.

9 Mo. R. 722; Reed vs. Austin; Ib. 784, Callahan vs. Griswold, and see 8 Mo. R. Hill vs. Paul.

McBRIDE judge delivered the opinion of the court.

John B. Higdon brought his action of trespass in the St. Louis circuit court against Samuel Conway, late sheriff of St. Louis county, for the taking of a slave, acted under a *fi fa* in favor of Carter et al vs. Higdon and one Charles Ely. The slave was the property of Higdon. The *fi fa* is regular on its face.

At the trial, Higdon, in order to defeat the sheriff's defence set up under the writ, offered to prove that there was no judgment to warrant the issuing of the execution—that is that the clerk of the court from which the writ emanated had mistaken the name of *Carter* for the true name of the plaintiff in the judgment. The sheriff objected; insisting that his defence consisted in the *execution*, and not the *judgment*; and the court sustained the objection, and ruled out all such evidence. Higdon took a non-suit, and moved to set it aside; which motion was overruled, and he brings the case here by writ of error.

The only question presented for our consideration, arises on the action of the circuit court in excluding the testimony offered by the plaintiff to prove that there was no such judgment of record in the circuit court as that set out in the writ. We had supposed that the question here presented was well settled by the numerous decisions of the courts

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of this country on the subject. The several cases referred to by the defendant's counsel, tend manifestly to establish the principle that a sheriff is not charged with the duty of going behind a writ in his hands, regular on its face, to ascertain whether the court rendered its judgment in accordance with the law and the evidence; or whether the clerk entered the judgment in conformity with the decision of the court; or whether the execution on the judgment followed the judgment thus entered; but it is sufficient for him that the execution is regular on its face, and emanates from a court having jurisdiction of the subject. To require more than this of a sheriff would be to require him to supervise, at his peril, the judgments of the court and the acts of the clerk; a power which the wisdom of the law certainly never intended to vest him with.

There is a case in 1 Cowen 413, more directly in point. The judgment was upon a bond and warrant of attorney; and, in issuing the *fi fa*, the attorney for the plaintiff had, by mistake, omitted the name of Addison Porter, and it was, by a like mistake, tested at the city of Utica, instead of the academy of Utica. The *fi fa* had been levied, and trespass brought by the defendant, on the ground that such levy was under an execution irregular and void. The court, on motion, permitted the writ to be amended, and so defeated the action of trespass.

Another case is reported in 1 Monroe, 7, of this character. A judgment was obtained by the plaintiff in error, on which a *fi fa* issued, and on its return, a *venditioni exponas*, which was returned with a delivery bond forfeited. On this bond a *fi fa* issued. The *venditioni* bond, and subsequent execution were all quashed on motion of the defendant in error, because the plaintiffs were misnamed in the rendition. In every other part of the record, as well as in the delivery bond, the plaintiffs are rightly named the "president, directors and company of the bank of Kentucky." In the *venditioni* they are styled the "president, directors and company of the *centre* bank of Kentucky. A motion was made and overruled, before the motion to quash was decided, to strike the word "centre" out of the *venditioni*. The court held that it was error in the circuit court to quash the writ; that the motion to amend should have been sustained.

This case should never have found its way into the courts of the country. The party bringing the action had a judgment against him upon which execution was issued, and the sheriff, ignorant of the error committed by the clerk in issuing the writ, levied it upon the debtor's property, when he satisfied the writ by the payment of the money to

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the sheriff, who doubtless paid over the money to the plaintiff in judgment, by which means the judgment is satisfied; and then the defendant turns round and brings his action against the sheriff for a clerical error committed by the clerk of the court. What injury has he sustained at the hands of the sheriff? certainly none. If a right of action existed against any one, it was against the clerk who committed the error; but pecuniarily the party sustained no injury. His feelings may have been somewhat hurt by having his property executed, but for this the courts of the country can afford him no redress. Had there, however been any apprehension that the money would not, when collected, been properly applied to the payment of the judgment, the defendants in the writ might have sought the remedy afforded by the statute, and had the writ quashed.

For the foregoing reasons we are of opinion that the judgment of the circuit court ought to be affirmed.

The other judges concurring, the judgment is affirmed.

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1. If a plaintiff proves the fact set forth in his declaration, the court is not authorized to instruct the jury that the plaintiff cannot recover, for the reason that his declaration sets out no cause of action, or sets it out defectively.
- 2d. If a defendant neglects to demur to a defective declaration, he cannot avail himself of the objection at the trial, but will be put to his motion in arrest of judgment.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

This was an action on the case brought by appellant, in the St. Louis court of common pleas against the appellee. The declaration contained three counts. The two first counts were substantially the same, differing mainly in this, that the first stated the case more fully in detail, the second more concisely.

The case stated in these two counts was, in substance, that on the 5th of January, 1846, one Stewart Mathews made a contract with the appellee, to erect and finish for her a hospital

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in the city of St. Louis, by a certain time agreed upon, for the price of \$6,650, payable in certificates of indebtedness, bearing interest at the rate of six per cent., 85 per cent. of which said price was to be paid in certificates as aforesaid, during the progress of the work, and the remaining fifteen per cent. after the completion of the work, after the settlement of all lawful claims, liens and demands against the building, on account of materials furnished and work done.

And that afterwards, on the 20th day of said month of January, the appellant and said Mathews entered into a contract by which the appellant was to do all the painting of said hospital, and furnish all the materials necessary therefor by the date named in the contract between Mathews and the appellee, for the price and sum of \$1000. That the appellant Bury fully complied with his contract with Mathews, and Mathews with his contract with the city of St. Louis. And that upon the completion of the work stipulated for in the said two contracts, Mathews owed Bury, the appellant, under the contract between them, the sum of \$350, and that the appellee, the city of St. Louis, then owed said Mathews, under the contract between them, the larger sum of \$581 62. And that the said sum of \$350 due to Bury as aforesaid, was a demand against the said hospital built as aforesaid—of all which the appellee had due notice. And that by reason of the premises, it became the duty of the appellee not to pay to said Mathews the aforesaid sum of \$581 62, until after the payment of said demand of Bury against said building on account of materials delivered and work done. But that the appellee, in violation of her said duty, whilst the appellant Bury held his demand against said building, and whilst said demand still remained due and unpaid, the appellee wrongfully, and in fraud of the appellants rights, paid over to Mathews the said sum of \$581 62.

The third count differs from the first two in this, that, for and upon the demand which he held as above stated against said hospital, he had a right to avail himself of a lien upon the building under the mechanics lien law, which it was the duty of the appellee to pay and satisfy, and in consideration that the appellant Bury would not avail himself of his said lien, the appellee promised to pay the amount of his said demand whenever she should be requested.

The appellee in due time filed two pleas to the declaration of appellant. First, the general issue of not guilty; and second, that she "was in no wise liable to the appellant in manner and form as he had complained against her."

To the second plea Bury's counsel filed a demurrer, and took issue on the first.

Afterwards, the appellee withdrew her second plea, and left the cause at issue for trial before the jury on the first plea.

On this issue, at a subsequent term of the court, the parties went to trial before the jury.

The plaintiff Bury proved the two contracts as stated in the declaration; that the work called for by Bury's contract with Mathews was done in accordance with that contract, and that the hospital contracted for between Mathews and the city of St. Louis, was finished by Mathews according to the contract between him and the city of St. Louis, and was received by the latter in discharge of the contract. That afterwards, and on the 24th July, 1846, the appellant Bury presented to the city engineer, in his office, an order of that date for \$350, drawn by Mathews in favor of Bury, and that at the time of the presentation of this order, there was due from the city of St. Louis to Mathews, a sum of money on account of the building of the city hospital, exceeding the amount of said order. The plaintiff, Bury, also proved that notwithstanding this, the appellee paid out after the presentation of the said order as aforesaid, to divers persons, the whole of the said amount due by her to Mathews, except the sum of \$76 23, which was paid last of all to Bury. That Bury having learned that the city had paid out as is stated above, the whole amount due by her to Mathews, except the said sum of \$76 23, he induced Mathews to give him two orders for his first one of

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\$350. One for \$76 23 which was paid as aforesaid, and another for \$173 77, which never was paid.

Bury also proved by the city engineer, who made the contract on the part of the city with Mathews, that he was city engineer as well during the time of the building and completion of the hospital, as when the contract therefor was made, and that when the contract between Mathews and Bury was made, it was deposited in the city engineer's office, and remained there until it was brought into court by subpœna duces tecum in this cause, and that it was so deposited in order that the appellant Bury might be paid as a sub-contractor, by the city of St. Louis. Moreover, that Mathews charged the city engineer that the amount coming to Bury under his contract should be retained by the city, and that the engineer promised Bury that it should be retained accordingly.

That the mode of payment by the city of the price she had agreed to give for building said hospital, was by the city engineer drawing his order from time to time on the auditor, on the application or request of the contractor Mathews, who upon such orders drew his warrant upon the treasurer, who paid out the money upon this warrant.

That the city engineer was authorized to cause a hospital to be erected for the use of the city.

Upon the close of the plaintiff's evidence, the court below instructed the jury that "on the case made by the plaintiff he cannot recover, for supposing all the matters set forth in the declaration to be proved, he has no cause of action." To this instruction the plaintiff excepted, and took a non-suit, with leave to move to set it aside, which was accordingly done. But the court overruled the motion, and plaintiff excepted and appealed.

POLK, for appellant.

1st. The plaintiff below produced proof to sustain the allegations of his declaration, or at all events the allegations of the first and second counts.

He was therefore entitled to recover. On the trial before the jury it is too late to attempt to defeat the plaintiff for the reason that the declaration does not state a cause of action sufficient to enable him to recover. Cost vs. Perbeck, Dong. 223; Camron vs. Reynolds, Coper 407; Safford vs. Stevins, 2 Wend. 158; 2 Fid's Practice, 489; Sanford vs. Sanford, 2 Day 559; Graham's Practice, 312.

2d. The defendant filed a plea to the declaration, which was obviously bad, and the plaintiff demurred to the plea; the consequence was, that this demurrer would cut back and reach any substantial defects in the declaration. The effect was the same as if the defendant had filed a demurrer to the plaintiff's declafation. 1 Chit. Pl., 707.

But the defendant afterwards withdrew the plea to which plaintiff had demurred, which was tantamount to withdrawing a demurrer filed by himself to the declaration of the plaintiff.

Now this court have decided that if defendant demurs to plaintiff's declaration, and the demurrer is overruled by the court, that he cannot afterwards go on to trial, and when a verdict is rendered against him move to arrest the judgment for deficiencies in the declaration. His refusing to abide by the judgment on the demurrer, and going on to trial on the facts, is a waiver of his right ever after to take advantage of the defectiveness of the declaration.

A fortiori must be a voluntary withdrawal of a demurrer—be a waiver of his right ever after to avail himself of the errors that may be in the declaration.

In this case then, where the plaintiff by his proof made out his case as set out in his declaration, he was entitled to his verdict first, and next his judgment thereon, as the defendant had waived his right to move in arrest of the judgment.

So that by the course pursued by the court in this case, the defendant gets the same advantage that he might have had by a motion in arrest of judgment, and that too when he had voluntarily and deliberately waived his right to such motion.

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3d. The common pleas court erred in telling the jury that " supposing all the matters set forth in the declaration to be proved, he had no cause of action." Because the third count at least sets forth a sufficient cause of action.

For the support of this I need only to refer to that count. The duty which it charges the defendant with a violation of, is based upon and arises out of contracts which it avers to have been made by defendant with plaintiff upon a valid consideration, made by defendant through an agent it is true, but through an agent thereto fully authorized. If, therefore, it be possible for the city of St. Louis to render herself responsible to Bury, by contracts, then the third count of this declaration sets forth a legal cause of action in favor of Bury against the city of St. Louis, the proof of which by evidence justifies a recovery by him.

4th. I also contend that Bury, the plaintiff below, was entitled to recover on the proof adduced by him to the jury, and that the court below erred in telling the jury by its instruction that "on the case made by the plaintiff he cannot recover."

For this position I rely mainly upon the case as it stands in the bill of exceptions, and refer particularly to the testimony of Kayser on page 31, showing a privity of contract between the plaintiff Bury and the city of St. Louis, showing that upon the request of both Mathews and Bury, he promised Bury that the amount coming to him under his contract with Mathews should be retained out of the amount due by the city to Mathews,

I also refer to the city ordinance on page 33 of the record authorizing the city engineer to cause a city hospital to be erected, as empowering the engineer to make the contract last referred to, as well as the contract between Mathews and the city for the erection of the hospital.

That this contract made with Bury through Kayser, was binding, I refer to the case of Mark vs. the bank of the State of Missouri, 8 Mo. 316, in which this court held that the bank might make a contract that would be binding on her, notwithstanding the 28th section of the charter provides that every contract or agreement in behalf of the corporation shall be signed by the president, and countersigned by the cashier, and that its funds should be held by no contract unless so executed.

McBRIDE, judge, delivered the opinion of the court.

The question presented for our consideration is, whether after a plaintiff has given evidence conducing to prove the facts charged in his declaration, the court is authorized, either on the motion of the defendant, or of its own accord, to instruct the jury that the plaintiff cannot recover, for the reason that his declaration sets out no cause of action, or sets it out defectively?

There are two modes treated of in the books on pleadings, by which a defendant can avail himself of defects in the declaration; one is by demurrer to the declaration, and the other is by moving in arrest of the judgment, should a recovery be had against him. The first is the most usual and advisable, inasmuch as defects which would be cured by verdicts, it would afford the plaintiff a more ready opportunity of amending his declaration, and presenting his case in such a form as would entitle him to a trial upon the merits.

In this case, the defendant filed a special plea to the declaration,

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which called forth a demurrer from the plaintiff; this state of the pleadings would have afforded the court a legitimate opportunity of deciding upon the sufficiency of the declaration, had the defendant not withdrawn his plea, for no principle is better settled in pleading, than that a demurrer tests the goodness of all the previous pleadings, whether on the part of the plaintiff or the defendant. Having withdrawn his plea, it was a virtual waiver, at least for the time being, on the part of the defendant, of any objection to the declaration, and this course may have been superinduced, from a confidence on the part of the defendant, that he could defeat the action, on the merits, and thereby obtain a bar to any subsequent action, for the same cause.

If, however, the defendant declines calling in question the sufficiency of the declaration, in the manner above indicated, and the plaintiff proves his case as therein set forth, is it the province of the court to instruct the jury that they cannot find for the plaintiff? Such a course on the part of the court, cannot be regarded as a demurrer to the declaration, and that too on the part of the court, and the effect of which is to preclude the plaintiff from amending his declaration.

We find the principle recognized in several of the books referred to by the plaintiffs attorney, that if the plaintiff proves all that is laid in his declaration, he ought not to be non-suited; that if the declaration is insufficient, the defendant may avail himself of the defect by demurrer; if he neglects to do that, he cannot avail himself of the objection at the trial, but will be put to his motion in arrest of judgment. The only ground for non-suit at the trial must be, that the proof is not sufficient to support the declaration.

Wherefore, the court of common pleas in its instruction and its judgment ought to be reversed, and the other judges concurring the judgment is reversed and the cause remanded.

PICOT vs. MASTERSON.

PICOT vs. MASTERSON.

1. A devisee cannot maintain an action of unlawful detainer, against a tenant of his testator. The case of Holland vs. Reed 11 Mo. Rep. affirmed.

ERROR TO ST. LOUIS CIRCUIT COURT.

TODD & KRUM for plaintiff.

The amended complaint showed a sufficient cause of action in this, to wit:

1st. It showed that defendants held the premises over after the termination of the time for which they were let and after demand made in writing for the deliverance of possession thereof by the agent of the person having the legal right to the possession. R. Code, page 513, sec. 3.

2d. The title of the plaintiff was such that it could not be inquired into, it being an assignment of defendants landlord's title with notice to defendants thereof. It is only titles that a tenant may contest, that sec. 26 refers to, as is contended. 2 Marsh Rep. p. 204; (Pirtles Dig. p —) decides that an heir, who has never had possession, may maintain forcible detainer against the tenant of his ancestor.

3d. Sec. 26, R. Code, p. 517, is not violated by sustaining this action, because the title presented is one that the tenant cannot dispute, because his landlords, and therefore cannot inquire into the merits.

GAMBLE & BATES for defendant.

1st. There could be no amendment of the complaint in any matter of substance, in the circuit court.

That court cannot hear and determine, an appeal, any other cause than that which was heard and determined before the justice. R. C. p. 670, sec. 18. 5 Mo. R. 504, Smith vs. Anthony.

2d. The amended complaint is obviously illegal, in setting up the merits of legal title against the express provisions of the act of forcible entry and detainer, and the repeated decisions of this court.

The recent case of Holland vs. Reed, decided in this court and still in manuscript, is full to our purpose, and cites the statute and the previously adjudged cases.

On that case we rely as conclusive.

McBRIDE judge delivered the opinion of the court.

Louis Picot brought an action of unlawful detainer before justice Hyde, of St. Louis county, against Masterson, and Masterson for a tenement in the city of St. Louis, and having obtained judgment, the defendants appealed to the circuit court, where, on motion, the plaintiff filed an amended complaint, setting forth that Ann Biddle, now deceased, leased the premises in question to one of the defendants, who went

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into possession under said lease ; that before the expiration of the lease the said Ann Biddle departed this life, having previously made and published her last will and testament ; that by said will the said lot of ground, leased as aforesaid, was devised to the plaintiff ; that the will of said Ann Biddle has been duly proved and admitted of record ; that the defendants term under his said lease has elapsed ; that possession has been demanded of the defendants, who now jointly occupy the premises, and that they refuse to deliver the possession thereof to the plaintiff, but unlawfully detain the same against him, &c.

The defendants moved to strike the amended complaint from the files, assigning, among other reasons, the following : "The amended complaint is in direct opposition to the statute, (R. C. § 26, p. 517,) in setting forth the merits of the plaintiffs title to the land in question, which that section forbids to be inquired into ; and yet the plaintiff must (§16) prove his complaint as alleged, without any plea of the defendants," which motion the court sustained, and the plaintiff excepted, and has brought the case here by writ of error.

The defendants here, having obtained possession of the premises in question, under a plea from the plaintiff, there being no privity of contracts between him and the defendants, can maintain this summary proceeding of unlawful detainer to recover the possession of the premises leased by his testator.

It has been assumed by the counsel on both sides, that the question here involved was decided by this court in the recent case of Holland vs. Reed, 11 Mo. R. 605 ; but the appellants counsel insist upon a review of the law and the adjudged cases on the subject.

To sustain the plaintiff's right to have this action, we are referred to 2 Marsh. 204, where the court of appeal of Kentucky, held, that an heir who has never had possession, may obtain forcible detainer against the tenants of his ancestor, and furthermore, that a warrant of forcible detainer may be maintained by a purchaser of a revision against a tenant of his vender. 8 Dane 113. But, as remarked in the case of Holland vs. Reed, the statute of Kentucky, under which that decision was made, differs from our statute under which we must decide the question. The Kentucky statute reads thus : "If a tenant at will, after the execution of the will by his landlord, or other tenant, after the expiration of his term in the premises, refuse to restore the possession to his landlord, he should be judged guilty of a forcible detainer, and may be proceeded against accordingly : *Provided*, however, that if the tenant deny that he entered the premises as tenant to

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the plaintiff, or to those under whom he claims, he shall not be adjudged a tenant within the meaning of this act, unless the plaintiff shall satisfactorily prove that the defendant obtained the possession as tenant to the plaintiff, or *to the person or persons under whom the plaintiff holds*, and that the defendant holds over."

Although the Kentucky courts have decided, as above stated, under their statute, yet they have further decided that a "warrant of forcible entry and detainer cannot be maintained, unless the plaintiff hath had possession in fact of the land." 1 Marsh 255; 3 Ib. 127; also, "a writ of forcible detainer is only maintainable when the occupant has entered under the demandant in virtue of a lease." 722 Marsh 12. And again, "to constitute a forcible detainer, there must be actual force with strong band, unless the parties stand in the relation of landlord and tenant." 3 Marsh 296. "Deeds of conveyance may be introduced to show the extent of the possession, but not to show the *right* of possession." 4 Bibb. 312-501. And yet there may be no conflict in the decision of these several cases, when the facts of each one taken into consideration; whilst, as we extract them from the digests, they are apparently irreconcilable.

The Kentucky statute evidently intends to give the action to one who holds the title, either by descent or purchase, directly from the lessor; whilst our statute intends to give the remedy only to the leasor. The only pretext for a different conclusion, upon a reading of the third section of the act (aside from adjudicated cases) is based upon the following language: "by the person having the legal right to such possession." Although these terms are vague and general, yet we think they are rendered definite and certain by the following restriction contained in the 26th section: "the merits of the title shall in no wise be inquired into, or any complaint which shall be exhibited by virtue of this act." If we are to disregard this injunction so far as to permit an heir to show title under his action, why may we not further relax the rule, and permit a purchaser from the lessor to show his title and maintain the action? Each title is equally meritorious in the eye of the law; each conveys or passes all the title which the lessor had at the time of making the lease. Then what substantial reason would forbid us to go a step further, and permit a party who claims title, derived immediately from the above, to maintain the action, he having the legal right to the possession? And if tolerated, would it not render the 26th section wholly inoperative?

The third and twenty-sixth sections, when read in connection, show

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very clearly to our mind that it was not intended that any derivative title should confer the right of action ; that the terms " legal right," as used in the third section, must be construed to mean the right of immediate possession, irrespective, and independent of the legal title to the property. As if A should lease a house and lot to B for five years, and B should sub-let the same to C, for two years ; at the expiration of two years if, C should refuse to deliver possession, the right of action would accrue to B., he having the legal right of possession, although the legal estate might be in A. Or, according to the first branch of the section, if A should sub-let to C, for the whole of his term, and C at the expiration of his term refused to give possession, then A would be entitled to his action, the interest of B having expired.

The act appears to be framed upon the familiar principle, that the tenant shall not dispute the possession of his landlord ; that having obtained possession of his landlady he shall, at the expiration of his term, act in good faith by yielding the possession to him of whom he obtained it, thereby placing the party in the condition he was prior to his having parted with the possession ; but as to all other persons, the tenant may require them to establish the right by which they seek to oust him of a possession peaceably and lawfully acquired. This requisition cannot be complied with in this form of action, hence the party seeking to turn the occupant out of possession, must bring his action in the ordinary form.

Although there is not in the Kentucky statute, as in ours, the same positive inhibition that the merits of the title shall in no wise be inquired into, yet the courts of that State, looking at the evident intention of the act, have held that evidence of title is irrelevant and improper in an inquisition of forcible entry and detainer.

The statute of Alabama is similar in this respect to our own, and under their statute the appellate court of that State have held that the " mere right of possession arising from the right of property, is not sufficient to authorize a recovery in this summary mode. The statute forbids any inquiry into the estate or merits of the title, on a complaint of this nature, and the plaintiff should have shown by his record, that he enjoyed the actual possession in person or by tenant." 1 Porter 146, and cases there referred to.

Wherefore, we see no sufficient reason to change the rule adopted in the case of Holland vs. Reed, 11 Mo. R. 605, and this case coming within the operation of that rule, the judgment of the circuit court ought to be affirmed, and the other judges concurring, the judgment is affirmed.

MULLEN vs. PRYOR.

MULLEN vs. PRYOR.

1. A plaintiff is not bound to prove more than he asserts in his declaration; if his declaration is insufficient, the defendant should demur or move in arrest of judgment.
2. In a suit instituted by an assignee against the payee of a promissory note, if the assignee proves the maker to be insolvent at the time of its maturity, his insolvency will be presumed to continue until the contrary be shown.

ERROR TO ST. LOUIS CIRCUIT COURT.

STATEMENT OF THE CASE.

George M. Pryor, brought suit against Wm. J. Mullen, in the St. Louis circuit court, at its April term for 1848, on a non-negotiable note, drawn by one Urbin E. Fort, payable to the order of said Mullen, bearing date December 12th, 1840, payable one day after date, and assigned to said Pryor on the 15th Dec., 1840, for the sum of two hundred dollars.

The plaintiff at the trial, read in evidence depositions of Louis Brown and Edward M. Samuel, taken at Liberty, Missouri, on 7th March, 1848.

Brown testified that he was acquainted with Urbin E. Fort. That Fort was engaged in printing a newspaper in Liberty, Mo. That said Fort had left some years—but cannot state exactly how long. That he had an account against said Fort about the time of his leaving here; that he presented it to said Fort for payment, and that he refused to pay it, because he said he had no money to pay it with; that his account was small, and was for pasturing a horse. That he never knew of his owning any property. Whether the press with which he printed his paper was his or not, witness did not know; nor did he know what amount of business he did, whilst he was conducting said press; that he (witness) took the paper printed by said Fort, but his acquaintance with him was not very intimate. That he cannot state what the general impression was in the community as to Fort's solvency about the time Fort left, but that he conversed with a person that he supposed knew most about Fort's business, who told him that it was not worth while to sue him—that he could not make any thing out of him by law, and hence he (witness) did not sue.

Edward M. Samuel, testified that he was acquainted with Fort—that he lived in Liberty, Mo. in the year of 1839 and 1840, and was engaged in publishing a newspaper there—thinks it was the "Western Star." That he had considerable business with the office in which he worked. That said Fort executed his note to Samuel and Arthur (of which firm witness was a partner) in the month of Feb.; 1840, and he did not think it worth while to try and force payment of said note whilst said Fort remained in Liberty. He did not think it could have been made out of him by law. Witness regarded him as insolvent, and that a suit at law would have been unavailing. That said Fort removed from Liberty, and thinks to the best of his recollection, said Fort removed in the latter part of the year 1840, and witness did not know where he had gone to. That he was (at the time of testifying) of the impression that from the time of the execution of the note in the case referred to, payable to Samuel and Arthur, to the 16th Dec., 1840, the money could not have been made out of said Fort by suit at law. That witness was not aware that said Fort, on the 16th Dec., 1840, had any visible means of paying his debts; that he never knew of his (F.) having any property of any kind whilst a resident of Liberty; he thinks the newspaper press he used, was owned by a "stock company;" that he (witness) does not know where said Fort lives, nor has he known where his place of residence was since he left Liberty. On cross examination said witness said that he (witness) was a merchant at the time alluded to in his examination, in chief, and dealt in merchandise, &c., and was what is commonly called a dry goods merchant.

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That he was not a printer by trade and never was engaged in the printing business; his impression is that said newspaper was published in the name of Mullen & Fort. The Fort of said firm is the same with that above referred to; that said Fort was a practical printer; that he has no certain recollection when Mullen left the said firm, but thinks it was in 1839; thinks that Fort continued to publish the said newspaper after Mullen left, but does not recollect how long. He does not think Mullen & Fort owned any part of the press; that Mullen was a practical printer. That the note held on Fort by Samuel & Arthur is for fifty dollars—one dollar of which is paid in May 1840. He does not know the amount of subscription to said paper, but thinks said firm did a fine business for the period, that Mullen & Fort owe him nothing; that in stating that Fort had no visible means of paying his debts, witness had no allusion to any accounts that he may have had on his books. That he never brought suit on Fort's note to Samuel & Arthur. Witness does not recollect of ever having known any execution against Fort being returned "not satisfied;" that witness purchased paper—printing paper—for Mullen & Fort and sold them goods and was often in their office, and that this was what he meant when he said he had "considerable dealings" with them—all of which they satisfied except the fifty-one dollars alluded to. That he cannot state positively, but he is of the impression that Fort has been in Liberty since he removed from there as aforesaid—whether he saw him or not, witness does not recollect. That G. M. Pryor resided within two miles of Liberty in the year 1840, and has ever since resided at the same place. He does not know that Fort owes any other person but himself as above, nor has he heard of his owing others. He knew nothing about executions against said Fort. His impression is that Fort, if ever in Liberty since his removal, staid but a very short time. Has no idea he ever made his home there since his removal in the latter part of the year 1840. Here the plaintiff rested his case.

Philander Frost, for defendant testified, that he knew Fort in 1840—thinks he knew him in December, 1840; that Fort was living in Liberty, Mo., where witness was living. That he (witness) never heard that Fort was insolvent. That at that time, and during his stay in Liberty, he would have given Fort credit; that he had dealings with Fort and that Fort always paid him punctually. That Fort had left Arkansas and returned to Liberty sometime in Dec., 1840. Witness did not know where he was at the time of testifying. This was all the testimony. The case was submitted to the jury.

The defendant asked the following instructions, which the court gave:

"That if the jury believe that if a suit had been brought against the maker of the note at its maturity, any amount could have been recovered against him which would have made it worth a suit so procced against him, then the verdict must be for the defendant."

"That to make the defendant in this action liable, it must be proved that a suit against the maker would have been substantially useless and unavailing,"

"That if the jury shall believe that at the time of the maturity of the note, the maker was in doubtful circumstances, but not utterly insolvent, then it was the duty of the plaintiff to have instituted a suit against him at the first term of the court after its maturity, and in that case, not having done so, he cannot recover in this action."

The defendant also asked the following instructions, which the court refused to give:

"Unless the jury believe from the evidence that Urius E. Fort, the maker of the note sued on was from the 15th day of December, 1840, to the time of the commencement of this suit, so insolvent that a suit against him would have been unavailing, they ought to find for the defendant."

"The plaintiff in this action cannot recover unless he proves that the maker of the note was so insolvent that a suit against him at any time before the commencement of this suit would have been unavailing."

"That the assignor of the defendant in this action is not to be regarded as a security; that he is only responsible on a contingency, and that the holder of such a note as that given in evidence in this case cannot, by deferring to make a demand for years, still hold the assignee responsible."

"That the plaintiff in this action having failed to make any legal demand upon the maker, and

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having waited more than seven years without proceeding against him, has shown no such diligence as will entitle him to any recourse against the defendant."

"That in order to a recovery in this action, the plaintiff must prove the insolvency of the maker at all times from the maturity of the note up to the institution of the suit."

"That if the jury shall believe from the evidence that the maker of the note was in doubtful circumstances, but not utterly insolvent at any time before the institution of this suit, then it was the duty of the plaintiff to have proceeded with the utmost promptitude, and to have prosecuted his suit against the maker with diligence to judgment, and not having done so, he cannot recover against the defendant in this action."

The verdict was for plaintiff. A new trial was moved for by defendant and overruled.

GRACE & CARROLL for plaintiff in error.

In this case the defendant ought not to be held liable on the note, unless the maker was insolvent from the time the note matured until suit brought. For it cannot be pretended that seven years indulgence shows any diligence, and without diligence, insolvency must be proved. Harris vs. Harnian 3 Mo. R. 317.

The error of the circuit court consisted in supposing that insolvency at the maturity of the note on the part of the maker, absolved the holder from all sort of diligence, and that he might hold on until barred by limitation, without losing his remedy. Surely this is not the law.

There is no proof that Fort was out of this State since his return in the fall of 1840. If the circuit court had given defendant's 2d, 5th, 6th, 7th and eighth instructions, the verdict no doubt would have been for defendant. And even if Fort was out of this State, the plaintiff was bound to have sued him wherever he was, or prove that such suit would have been unavailing. Myers vs. Miller 3 Mo. R. 402. In the case of Pocock vs. Blount, 6 Mo. R. 338, this court say expressly (making the language of chief justice Marshall in the case of Violett vs. Paton, 5 Cranch 142, their own), "it therefore would have been proper to leave it to the jury to determine whether it was at any time in the power of the plaintiff to have made the money due on this note, or any part of it from the maker by suit."

POLK for defendant in error.

1st. It is sufficient to render the endorser (of a non-negotiable promissory note) liable on his endorsement, to show that the maker was insolvent at the date of the maturity of the note, so that a suit would have been unavailing against him—it is not necessary to show that the maker continued so insolvent down to the time of commencing suit. Revised statutes of 1835, page 105, sec [9].

2d. In this case, the declaration alleged the insolvency of the maker only at the maturity of the note, and not that such insolvency continued down to the commencement of the suit. And as it can only be required that the proof shall be commensurate with the allegations, it was only necessary to prove insolvency at the maturity of the note. If the plaintiff came short of making a case for recovery, the deficiency was in the declaration, and that defect could be reached only by demur or motion in arrest of judgment and not by instructions on the trial. 2 Tidd 849; Graham's Pract. 212; Cort vs. Birbeck, Dong. 223; Safford vs. Stevens, 2 Wend. 158; Sanford vs. Sanford 2 Day 559.

3d. But even if the court had instructed the jury that plaintiff was bound to prove continued insolvency of maker of the note, the result must have been the same; for it is shown by the verdict that the jury found the maker insolvent under the instructions of the court, at the maturity of the note. Now in the absence of proof to the contrary, being shown to be insolvent at the

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maturity of the note that insolvency is presumed still to continue. 2 Stark Ev. 688 and authorities there cited. Moreover, the evidence in this case showed that shortly after or about the time of the maturity of the note, the maker left for parts unknown, and has not been heard from since.

4th. That a demand of payment at the maturity of the note upon the maker, and notice of non-payment is not necessary. Pocock vs. Blount. 6 Mo. R. 338.

NAPTON, judge, delivered the opinion of the court.

Pryor instituted a suit in 1848, against Mullen, upon a note executed on the 12th Dec., 1840, by one U. E. Fort, and assigned by said Fort to the plaintiff on the 15th Dec., 1840. The declaration charged the making and assigning of said note in the usual way, and avers that when the said promissory note became due and payable, to wit on the 16th Dec., 1840, the said Fort, the maker, was insolvent, so that a suit against the said maker of the said promissory note aforesaid, would have been unavailing, by means whereof, and by force of the statute, &c., the said defendant became liable, &c. The defendant put in the statutory plea and the parties went to trial. Upon the trial, evidence was given to show that Fort was insolvent when the note assigned to Pryor was due. The defendant called upon the court to instruct the jury that the plaintiff must prove the defendant to have been insolvent at all times, from the time his note fell due until the institution of this suit. This instruction was refused, and its refusal presents the only point assigned for error. We think the instruction was properly refused, because the declaration only averred an insolvency at the maturity of the note, and a party is not bound to prove more than he asserts in his declaration. If the declaration was insufficient, the defendant should have demurred, or moved in arrest.

Would not the fact of a subsequent change in the condition of the obligor after his insolvency at the maturity of his note is alleged and shown, be more properly a matter of defence? It would seem that when the plaintiff shows a state of insolvency at a time, when by law he is bound to sue, if a suit can effect any thing, that state of things will be presumed to continue until the contrary be shown.

Judgment affirmed.

O'BLENNIS vs. THE STATE.

O'BLENNIS vs. THE STATE.

1st. To furnish another with money to set up a faro bank, and receive a part of the winnings is not an offense against the 16th section of the 8th article of the act concerning crimes and their punishments. Rev. Statutes 1845, p. 402.

APPEAL FROM ST. LOUIS CRIMINAL COURT.

LESLIE for appellant.

After the evidence had been adduced on the part of the State, the judge, on his own account, gave the following instruction :

"If the jury find from the evidence that the defendant was a partner in carrying on a faro bank, furnishing a part or the whole of the money required to carry it on, and that money was bet and won upon said bank, whilst the defendant was partner as aforesaid, upon the joint account of the said defendant and on other or others; and that this was done within the county of St. Louis, the jury will find the defendant guilty, &c."

This instruction is objectionable for many reasons.

1st. Because there is no evidence of co-partnership in any legal sense of the word to which to apply the said instruction.

2d. Because loaning money to be used in betting, and receiving a part of the money so won for the use of the money so loaned, is not an overt act of betting within the meaning of the statute upon which this indictment is founded, the motto *qui facit olliam facit per se*, has no application to *misdemeanors*, or to criminal offences of any kind, unless by statute it is enacted that such persons are aiders or abettors, in which case they should be indicted for the real offence they may have committed against the statute.

3d. There is no evidence that the amount which might have been won had any effect or varied the amount received by defendant for the money loaned, and the instruction is erroneous on that account.

NAPTON, judge, delivered the opinion of the court.

This was an indictment against O'Blennis for betting at faro. The indictment contained but one county, and that charged that the defendant "at and upon a certain gambling device commonly called faro bank, adapted, devised and designed for the purpose of playing at games of chance for money, unlawfully did bet money, contrary &c." On the trial a witness testified "that he had never seen the defendant bet at faro, but that defendant told him that he had *staked* a man with money to set up a faro bank on third street, St. Louis, and that for staking him, or furnishing him with money, he had received for money won at said faro bank rising of four hundred dollars, and that he had never seen the defendant when the bank was kept." Another witness testified to a similar acknowledgment, and this was all the evidence. The court in-

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structed the jury as follows: 1st. If the jury find from the evidence, that the defendant was a partner in carrying on a faro bank, furnishing a part or the whole of the money required to carry it on, and that money was bet and won upon said bank whilst the defendant was partner as aforesaid, upon the joint account of said defendant and another, or others, and that this was done within the county of St. Louis, the jury will find the defendant guilty, and fix his punishment by a fine of not less than ten nor more than twenty-five dollars. 2d. If the jury believe from the evidence that the defendant was not interested as a partner in the betting and winning of money upon the faro bank in question, but merely loaned money to the person engaged in carrying it on, although the defendant knew the use said money was to be applied to, and received a compensation for its use, they will find the defendant not guilty.

Instructions were asked of a counter character to those given, but refused. The defendant was found guilty and fined.

The 14th section of the 8th article of the act concerning crimes and punishments is directed against persons who *set up* or *keep* a faro bank, and permit others to bet on it. The punishment for this is fine (not exceeding one thousand dollars) and imprisonment. The 16th section prescribes a punishment for those who bet upon the bank. The indictment against O'Blennis is framed under the latter section. The hypothetical case put to the jury in the first instruction of the court is, that if A and B are partners in carrying on a faro bank, A furnishing the whole or a part of the money, and receiving his share of the winnings, and B personally superintending the game, A is guilty of betting on the bank under the 16th section. Now, the active partner in the case put, is clearly guilty under the 15th section, and punishable by fine and imprisonment. The dormant partner is merely morally guilty of the same offence. If he is not responsible *criminaliter*, it must be because he is not present when the game is carried on—in other words, because he is what may be termed a dormant partner. Whether this excuse would avail him or not, we are not now called upon to determine. But how can he be held responsible under the 16th section, when it is plain that the same reason which is supposed to exempt him from punishment under the 15th section would just as well apply to the 16th section? He is punished, upon this construction, by a paltry fine of ten or twenty-five dollars, for instigating, or aiding or committing the same offence which in the preceding section of the law, is visited with a more severe and ignominious punishment. The 16th section was evidently not designed to punish offences as these. To *set up*, or *keep*, or *carry on* a faro bank

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(we suppose the phrases are all designed to mean the same thing) is an offence greatly more injurious to the public morals, than the act of betting upon the gambling device so set up or conducted. The former is followed as a profession, and its professors go about, seducing the unwary, and holding out temptations to dissipation and vice, and leading thousands to ruin. The latter offence is committed often in the thoughtlessness of the moment—to amuse an idle hour, and without a clear perception of the corrupting associations and vicious habits to which the practice so often tends. The punishment for the two offences is therefore widely different, and adapted to the supposed magnitude of each. But to punish the man who can find another weak enough or vicious enough to consent to be his instrument in violating the provisions of the 15th section, with a small fine, whilst the instrument is sent to prison and heavily fined, is an inconsistency of design in the law-makers which we are unwilling to attribute to them. If it be that the law has overlooked such a case, the court cannot help it. This will be no reason for bringing the offender within a provision not literally applying to his case, and evidently having no reference to his offence.

The other judges concurring, the judgment is reversed.

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1. A contracted with B to build for him a boat hull, and deliver it on a stated day. He failed to deliver it until two months after the time specified; but B received it at the time without objection; A sued to recover a portion of the stipulated price; B offered to prove that by reason of this delay he had failed to realize the profits of the boat during these two months. Held to be no bar to A's right to recover the stipulated price.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.**STATEMENT OF THE CASE.**

This was an action of assumpsit on the common counts brought by Maguire against Taylor. The defendant Taylor pleaded the general issue, upon which the cause was tried by a jury,

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who rendered a verdict for the plaintiff for \$5,275, for which amount judgment was rendered. The defendant in the court below filed a motion for a new trial within the proper time, for the reason, as was alleged, that the verdict was contrary to law and the evidence, and because the court rejected competent evidence offered by defendant. The motion was overruled, and the defendant excepted and appealed to this court. The bill of exceptions shows that the plaintiff claims fifteen thousand dollars for work and labor done and materials furnished in building a steamboat hull for the defendant. The bill of particulars furnished by the plaintiff, sets out in detail the materials and work for which the plaintiff claims, with the price of each article. The plaintiff then proved that he furnished the materials and performed the work as enumerated in his bill of particulars, and that the prices were reasonable, and that the hull was delivered to defendant on 12th April, 1847. That Taylor accepted the hull and made no objection to the quality of the work. That from the time of the delivering it was about six weeks or two months before the hull was completed as a steamboat, and ready to run. It was also proved that there was a written contract between Taylor and Maguire concerning the building of the hull, which contract was proved and read in evidence to the jury by defendant, after the plaintiff had closed his evidence. The contract is set out in the bill of exceptions, from which it appears that it was dated 8th September, 1846, and that Maguire undertook to build for Taylor a hull of specific dimensions; to furnish all the materials, and do all the work pertaining to the ship carpenter, except that Taylor was to furnish the "tie-bolts" and rudder-iron, and Maguire was to have the boat ready to receive the engines by the 1st of February, 1847. In consideration for which, Taylor agreed to pay Maguire nine thousand dollars in manner following, viz.: One thousand dollars in hand; one thousand dollars on 1st November, 1846; one thousand dollars on 1st December, 1846; one thousand dollars on 1st January, 1847, and five hundred dollars when the hull was completed. The balance was to be paid in the notes of Taylor, payable the first at four months from the completion of the hull; the second at six months from date; the third at nine months from date, and all to be dated at the time of the completion of the hull. At the foot of the contract and, below the signatures, is a memorandum signed by Maguire, to the effect that if the notes to be given by Taylor, be not met at maturity, they were to be renewed, by adding interest. The plaintiff also gave evidence tending to show that after the delivering of the hull to Taylor, on 12th April, 1847, there was no work to be done by Maguire, except to put on the rudder, and that some delay occurred in doing this for want of the rudder irons, which were to be furnished by Taylor, but that this was done, and the rudder put on before, or as soon as Taylor had put on the cabin, and had the boat ready to run. Plaintiff proved also, that he commenced work, getting out timber, &c., for the hull, about 1st October, 1846. That in the progress of the work Taylor several times objected to the lumber that was put into the boat, which the witness thought was good lumber, but that Taylor required it to be taken out, which was done, and it was replaced by other planks. That this caused some little delay in completing the work. That after the 1st February, 1847, Taylor was about the boat yard, and gave directions, as before, concerning the building of the hull. That before and after 1st February, Taylor was all the time hurrying those employed on the boat, saying he was afraid he should lose the season run, if he did not soon get the hull. He also gave evidence tending to show that the work had been somewhat delayed by the severity of the winter, and the difficulty of obtaining lumber. This was all the evidence on the part of the plaintiff. The defendant, after reading in evidence the written contract before referred to, offered to prove that he performed all that was required in the contract to be done on his part, and that by the failure of the plaintiff to build and deliver the hull at the time specified in the contract, the defendant lost the use of the boat for the space of two months, and that the boat could have been chartered to other persons for the period lost, for a sum exceeding the whole amount of the contract price remaining unpaid; to the introduction of which proof the plaintiff objected, and the court refused to allow the proof to be made, to which the defendant excepted at the time,

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and has appealed to this court, and assigns for error the refusal of the court to grant him a new trial, and the exclusion of the testimony offered by him as above.

CROCKETT & BRIGGS, for appellant, insist:

1st. That the defendant in the court below had a right to recoup his damages sustained by Maguire's failure to complete the hull according to contract. *Patterson vs. Price*, 3 Hill's Rep. 171; *Reab vs. McAllister*, 8 Wend 109, same case, Wend 483; *Barber vs. Rose*, 5 Hill 76; *Van Eppes vs. Harrison*, 5 Hill 63; *Still vs. Hall*, 20 Wend 51; *Ives &c. vs. Van Eppes*, 22 Wend. 155; *Ladue vs. Seymour*, 24 Wend. 60; *Silsby vs. Patterson*, 14 Wend. 257; *Beecker vs. Vrooman*, 13 John 302; *King & Mead vs. Paddock*, 18 John 140; *Sedwick* on measure of damages, 457 et seq.

2d. That the damages offered to be proved by defendant, and the proof of which was rejected by the court, was not speculative, but resulted directly and proximately from the breach of contract on the part of Maguire. Taylor lost the use of the boat for more than two months, during the best part of the season, and offered to show that such use would have been worth more than the balance due for the purchase money. Such proof was competent.

3d. That although the general rule is in actions for a breach of contract for the sale and delivery of chattles; that the criterion of damages is the difference in value of the articles on the day of actual delivery, (where they have been received by the vendee) and the value on the day when they ought to have been delivered. Yet this rule applies only where the price is to be paid on delivery; not where the price is paid in advance, as in this case—nor where the contract is for the sale and delivery of articles for the use and accommodation of the vendee, and not for purposes of trade and commerce. 2 Burr, 1005, 1010; 2 East. 211; 2 Cowen 82; 8 Wendell 129; 24 Wendell 322; *Clark vs. Pinney*, 7 Cowen 681; *Sedwick* on rule of damages, 112, 260, 276; 3 Wheat. 200; 2 Cowen's Rep. 485.

4th. That the case at bar is not, in its proper sense, a contract for the sale and delivery of a chattel for purposes of trade and commerce, but was an undertaking on the part of Maguire to perform specific work within a given time, *Taylor agreeing to furnish a part of the materials* to be used in the work, and when completed, was to be used, as shown by the proof, not as an article to be sold, but to be used by Taylor, and therefore the rule governing the sale of chattles to be delivered at a given day for the purpose of trade, barter, and sale, is not applicable, but if they were applicable, Taylor having paid a part of the purchase money in advance, is not restricted in his damages to the rule applicable to cases where the purchase money is to be paid on the completion of the contract.

5th. That from the facts as proved, it may fairly be considered to have been in the contemplation of the parties at the date of the contract, that Maguire should be held liable for *all* losses arising from his failure to complete the hull at the stipulated time, and especially "such profits and advantages as are the immediate fruits of the contract. These are a part and parcel of the contract itself, entering into and constituting a portion of its very elements—something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. *Masterson vs. Mayor of Brooklyn*, 7 Hill 65; *Sedwick* on rule of damages, 81, 84.

6th. That according to the contract given in evidence, the balance of the purchase money was to be paid by Taylor in his notes, at four, six and nine months from the completion of the hull, and then to be renewed at his option, including interest. This suit was commenced on 29th May, and before the expiration of the stipulated credit. This cannot be done in a suit on the common counts. The only recovery in such cases, is by suit on the contract for failure to give the notes. But after the expiration of the credit, suit may be maintained on the common counts. In this case, suit was brought before the expiration of the credit, and

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therefore the verdict for the whole balance of the purchase money, was contrary to law and the evidence, and a new trial ought to have been granted. Sedwick on rule of damage, 285 Ginnard vs. Daggart, 5 Serg. & R. 19 ; Messer vs. Price, 4 East. 147 ; Dutton vs. Solomonson, 3 B. & P. 582 ; Hoskins vs. Duperoy, 9 East. 498 ; Hutchinson vs. Read, 3 Camp. 329 ; Hanna vs. Mills, 21 Wend. 90.

TODD & KRUM for appellee insist.

1st. That the court did right in refusing to suffer the appellant to give the evidence by him offered, because what he offered to prove was not a legal claim in his behalf against appellee either as a right of action, or in mere mitigation of appellee's claim. 1 Gull. Rep. 314-325 denies profits of a voyage broken up by illegal capture; 21 Wend. Rep. 342 a case in point in its facts substantially.

1 How. Rep. 25, denies profits of voyage broken up by collision.

21 Wend. 144, denies to defendant on judgment for him any profits he might have made on the saw logs taken from him by a writ of replevin. Suppose a steamboat taken instead of saw logs.

17 Pick. 453. denies profits of voyage broken up by illegal attachment.

3 Humphrey's 56, is a case where the plaintiff sued defendants for plow castings. The defendant showed a contract, and that plaintiff had not performed it by not delivering the quantity, and insisted for this that plaintiff could not recover any thing. This was overruled. Also that thereby defendant was delayed in his business and lost—this defence refused. Also that the castings were of a poor quality, and thereby his reputation was injured in his business—this refusd. Also, that by reason of plaintiffs non-performance he lost profits he otherwise would have made. This defence also overruled.

It should be borne in mind, that what Maguire was to make was only a part of boat—over the machinery—the most important of all, the cabin, finish, tackle, &c., he had no control. Whether the hull would ever become part of a steamboat or not, was uncertain, and at least beyond his control. The hull by itself was not a subject to found a loss upon, from not having it to use.

2d. If the action was immaturely begun, the appellant was competent to waive it, as he did by not making the objection below. It is a personal privilege whether a party will object to his being sued before the debt is due, as much so as if sued out of his county, or his trial be had at a term too early. 10 Mo. Rep., 454. If he would object he should plead in abatement in the latter case, a plea to the meri's waiving it; and in the former case he should by demurrer, if it appears upon the declaration, and if not, but came out in proof then as soon as it appeared.

To lie by and take the chances of the result should be fatal to the right of this objection, as much so as after gaining a verdict which is set aside and a new trial granted, and the second verdict is lost, the party loses all benefit of any error in granting the new trial, by taking his chance of the second as decided by the court.

3d. It is insisted that after verdict the party loses the benefit of this objection, because from the nature of the case, it is not cause for setting aside the verdict. The verdict is right notwithstanding. It is cause for non-suit, and therefore to be taken advantage of on trial.

4th. The point was not made below at all, and thus all the benefits of a motion for a new trial, to wit: among others that the judges below may more maturely consider what is hastily done on the trial, are lost, and the question comes as fresh and naked into this court, as if there were no motion for a new trial. Where the objection is not specifically raised below, it is the repeated decision of this court that it will not take notice of it above. Besides, it is forbidden by section 32, p. 906, R. Code 1845.

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5th. Section 7th of the act to simplify proceedings at law, approved February 13th, 1847, p. 109, session acts 1847, declares that no suit shall be dismissed for want of form, but the same shall be determined upon its merits. Hence it was indifferent whether the suit was on special counts, or as it is, as the merits could and were gone into, as well in the one as the other.

NAPTON, judge, delivered the opinion of the court.

A question has been made in this case, whether the plaintiff was entitled to recover under the common counts, the amount agreed to be secured by the defendant's notes, before they fell due; but the point was not raised in the circuit court, either by instructions or otherwise, and it cannot, for this reason, be assigned for error here.

The only question to be determined is, the one arising out of the exclusion of the evidence which the defendant below offered. The defendant had received the hull of the boat which the plaintiff had contracted to build, about two months after the time when, by the contract, it was to have been delivered, and in this action to recover a portion of the stipulated price, he offered to prove that by reason of this delay he had failed to realize the profits of the boat during these two months. In other words, the defendant desired to prove that he could have hired the boat during these two months for a sum equal to the amount of the purchase money unpaid.

All the authorities agree in excluding what are called speculative damages in cases of this character. The vendee is entitled to an indemnity for the actual loss sustained, by reason of the failure of the vendor to comply with his contract, but in the absence of all fraud, he has never been allowed damages remotely consequential, and resting in mere speculation.

The result of the cases, which are numerous, is stated in a few words by Mr. Sedgwick in his treatises on this subject. "The value of the article at the time of the breach, with interest for delay, seems to be as near an approach to the actual loss sustained, as can be effected, without embarking on a vague search for facts, impossible, in most cases, to be proved with any degree of satisfaction. If it be shown that the article was to be delivered for some specific object, known to both parties at the time, and that thus a loss within the contemplation of both parties has been sustained, it may form an exception to the above rule." Sedgwick on damages, 277.

The precise class of cases to which the author refers in this last paragraph, is left to conjecture. If a lessor's title to a house fail, he is

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bound to pay the lessee the expense of removal, and indemnify him against the advance of rents. So, perhaps, where a mechanic undertakes to build a house by a specified time, and the house is not completed at the time fixed, in consequence of which, the person with whom the contract was made, has to rent another house, he would be reimbursed for the amount expended in rent. The losses in these cases are not at all speculative, and are clearly within the contemplation of the parties at the formation of the contract. But if the leasee, in the case first put, should not only claim the expense of removal, and the advance in rents, but also an indemnity for the loss of custom in a business he may have established whilst residing in the house, such a claim would be rejected. This last would be a claim very similar to the present one. It is not easy to imagine a case of speculative damages, if the expected profits of running or hiring out a boat, during the two months of delay in the delivery, would not fall within the designation. The fact that damages are speculative, does not however constitute the sole objection to their admissibility; for it must be admitted that damages are frequently allowed which are, to some extent, speculative. A fixed interest is given by law for the detention of money; yet it is not certain that the creditor, had he received his money when it was due, would have realized a profit equal to the interest. But the law has determined the value of money, at a rate which approaches its actual worth under ordinary circumstances, and without the intervention of extraordinary accidents. So the rule in relation to damages for the detention of any other property, is determined by converting the property into its money value, at the time it was to be delivered, and giving the legal interest upon that value; that being supposed to be as near an approximation to the actual loss as can be attained, without going into speculations of an indefinite and hazardous character.

The loss then which forms the criterion of damages, must not only be free from the objection of being speculative and remote, but it must be a loss within the probable contemplation of the parties at the time of the execution of the contract. How will this rule apply to the claim set up in this case? It is scarcely possible, that the damages claimed by the defendant could have been in the contemplation of either party, and certainly not of the plaintiff at the time of entering into the contract. The vendor would reasonably expect that his liabilities in the event of a breach on his part, should be proportioned to the remuneration he would receive in case of a breach on the part of the vendee; that if the vendee is to be indemnified for profits which he may have failed to

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realize by reason of the failure to deliver the boat in time, the vendor should have the benefit of the same rule, in case of the non-payment of the purchase money by the vendee at the time agreed upon. A rule which is not reciprocal can scarcely be a just one. But the vendor is apprised that such a measure of damages for the failure to pay the purchase money, will not be meted to him; that he can recover the principal due and the legal interest only, although he may be able to prove that he could have realized one hundred per cent. instead of six per cent, had he received his money according to contract. If, then, he can never expect to receive by way of reimbursement for losses, any more than the legal interest of the money withheld, it is unreasonable that he should be subjected to any more damages for a breach on his part, than what would be equivalent to the interest upon the value of the boat at the time of the breach, and the difference between that value and its value at the time of the delivery, if there has been a decline.

Prudent men would scarcely venture to make contracts like that upon which this suit is brought, if damages for a breach of them be extended to remote and speculative consequences. No foresight or skill can always prevent delays in the execution of such contracts. It appeared, in this case, that the winter of 1846-'47, was unusually severe; and that this circumstance occasioned unexpected delays in procuring and working up lumber. It is also recollected that in the spring of 1847, there was an extraordinary demand for boats, upon the opening of navigation. The contract between the plaintiff and defendant, was in all probability made without reference to the happening of either of these unexpected events.

But how difficult would be the task assigned to juries, if the court adopt the rule of damages desired by the defendant. It would be a mere calculation of chances. They would have to weigh probabilities in order to arrive at any equitable result. Because the defendant was offered five thousand dollars for the use of a boat, such as he had contracted for, during two months, it will not do to say that he is entitled to the five thousand dollars as the actual loss he has sustained by reason of the breach of contract by plaintiff. There were risks to be encountered in such a bargain, which undoubtedly would have to be considered, in estimating even the *probable* loss, or rather the failure to make *probable* gains. The boat may have been burned, or snagged, or sunk; the persons with whom the contract was made may have proved insolvent; or if the solvency of the contractors and the life of the boat were

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both insured, the insurance company may have proved insolvent. These are merely suggested as possibilities, the value of which must be estimated in undertaking to estimate the actual value of the bargain in cash. It will be seen at once, that the result of such calculations will depend upon the complexion of the jury, and there will be no fixed standard to guide them, no settled rule which they must follow, but every thing must be left to the caprice or fancy of the trial of fact.

The case of _____ (21 Wend. 347) is decisive of the point raised in this case. That was an action for the price of a steamboat, and the court refused to let the defendant recoup damages sustained by the loss of trips, and the profits resulting therefrom, by reason of defects in the boat or machinery.

The other judges concurring, the judgment is affirmed.

SUPREME COURT,

JANUARY TERM, 1849.

HAYDEN *vs.* CORNELIUS, LAMMÉ & PAYNE.

1. A debtor on the eve of insolvency conveyed to certain securities jointly, property to indemnify them against the payment of the debts for which they were severally bound; if the property proved insufficient to secure them fully, a court of equity will make them bear the loss proportionately unless there is a clearly expressed intention to give some a preference.
2. If a person has an interest in a trust fund, he is not a competent witness to increase the fund.

APPEAL FROM BOONE CIRCUIT COURT.

TODD for appellant, insists :

- 1st. That it was error in the court to admit the parties Wood and Todd, makers of the trust deed to testify, so as to change the terms of the deed, and diminish Hayden's interest in the funds secured thereby, and increase their own. 1 Mo. Rep. 214; 4th do. 23; 1 Greenleaf, p. 455 to 460, sec. 386-9-90-92;
- 2d. The decree is erroneous, for
 - 1st. The obligation to pay Caves' debt for Hayden's interest, was certain upon good consideration;
 - 2d. He is not proven to have agreed to any other contract than is made in that obligation.
 - 3d. He did not make himself a party in the deed of purchase or deed of trust, and the parties so understood it, and his testimony objected to does not prove any agreement by him with the trustees other than their express obligation.
 - 4th. Complainant is entitled to a decree for the whole debt and interest.

LEONARD for appellees.

- 1st. Hayden assented to the arrangement that was made between Cornelius and his other securities for their and his benefit, and cannot be allowed now to wrest the undertaking Payne and Lamme gave to Cornelius for him on the faith of that assent; to altogether a different purpose and thus compel Payne and Lamme to pay him money as a mere gratuity, without any consideration whatever.
- 2d. If Hayden could repudiate his assent to the terms of the trust created upon the property;

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and be allowed to stand in the shoes of Cornelius, he would then only be entitled to the same equity, that Cornelius would be were he in court asking the specific execution of this undertaking of Payne and Lamme, and against Cornelius' equity to this relief, it would be a sufficient answer that the property he conveyed and warranted was encumbered to more than the amount of money now withheld, and which if forced out of the defendants by the decree of the court, could never be recovered back on account of Cornelius' insolvency, or if it could, then only by compelling our citizens to seek redress of Cornelius in a foreign state.

3d. Woods and Todd were both competent witnesses for the defendants. They were not parties to the suit nor interested in the result. A decree directing the defendants to pay the whole sum specified in their undertaking to Cornelius, would neither increase or diminish their portions of the trust fund—that was settled by the deed of trust, and the personal liability of the defendants to pay the money now sued for has nothing to do with the interest of the witnesses in the trust property.

4th. The deed of trust and the judgments and executions given in evidence were competent testimony to establish the fact of their existence, and that fact was relevant to the controversy between the parties.

5th. If the decree made were reversed, no decree could be now made for the complainant for want of proper parties before the court. There was no service of process on Cornelius, nor any appearance by him, and the constructive notice by publication is insufficient.

NAPTON, judge, delivered the opinion of the court.

This was a bill in chancery. The facts which may be assumed from the bill, answer and exhibits, were these :

About the 19th Nov., 1841, Cornelius, being on the eve of insolvency, and willing to secure certain persons who were his securities for large amounts, executed two conveyances to these securities for property which they consented to estimate at \$10, 500. The first conveyance was made to Payne, Wood, Lamme, J. W. Harris. C. R. Harris, Todd and Murrill, and embraced several tracts of land and town lots. The consideration of this deed was \$7,500, and the deed contained the words grant, bargain and sell, and also a clause of general warranty. The second deed transferred some slaves, judgments, &c., for \$3,000, secured to be paid by the grantees, who were the same persons in the first deed named. On the same day a third deed was executed by the grantees in the first two deeds to Payne and Lamme, as trustees to sell the property conveyed by the first deeds and appropriate rateably to the extinguishment of certain debts of Cornelius, for which the grantees were already responsible. This deed recited that in consideration of the sale by Cornelius, Payne, one of the grantees, had executed his obligation to pay \$1,180 20 on a certain bond in which he was security for Cornelius, and Payne, Woods & Co., had executed their obligation to pay \$1,299 on another bond in which they

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were securities, and so on enumerating all the different obligations which the securities who were grantees had given to extinguish a certain portion of Cornelius' liabilities. Among these it was recited that Lamme and Payne as trustees had executed their obligation to pay H. Cave \$502 60 on a bond in which Joel H. Hayden stood securities. In consideration of these obligations, Woods and wife, C. R. Harris and wife, J. W. Harris, Murrill and wife and Todd and wife; conveyed the property to Lamme and Payne *in trust* to pay off the several sums thus enumerated to be due from Cornelius to his creditors.

The obligation upon which the present suit is based, is the one executed by Lamme and Payne to pay off a portion of Cornelius' note to Cave, on which the complainant Hayden, was security. This obligation is as follows:

"Know all men by these presents, that for and in consideration of the sale and conveyance of certain real and personal estate, by W. Cornelius and wife to us and others, we hereby bind ourselves and heirs, executors, &c., to pay the sum of five hundred and two dollars and sixty cents, on a certain bond given and executed by said W. Cornelius and Joel H. Hayden security to Henry Cave, and now being in suit in the Boone circuit court, and to save said Cornelius from the payment of said amount on said note and all interest arising thereon from this date, 19th Nov., 1841.

DAVID S. LAMME, trustee,

MOSES U. PAYNE, trustee."

Hayden, the complainant, had been compelled to pay this note to Cave—Cornelius was insolvent and a non-resident—and the object of the bill was to compel Lamme and Payne to pay the said sum of \$502-60 and interest according to the tenor of this obligation, which Hayden, as security, considered himself entitled to the benefit of, in equity.

The answer of the defendants placed their defence upon two grounds. They assert that the complainant, although not present at the first meetings of the securities, was yet advised of the arrangements which had been agreed upon before they were consummated, and that he approved of and sanctioned them—that he fully understood that he was to share the fate of the other securities, and if the property conveyed to the trustees, did not bring the full sum of \$10,500, then the securities were to lose rateably. They alleged that the deed of trust to Lamme and Payne was made as well for Hayden's benefit as for the benefit of

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the other securities therein named, and that they (Lamme and Payne) acted for Hayden in signing the obligation they gave to Cornelius to pay off \$502 60 on the Cave note. They declare that they called upon the complainant to give them some written acknowledgment of the transaction, but he refused to do so, and insisted on their responsibility to him for the full amount of \$502 60.

The answer and evidence further showed that the property conveyed by Cornelius was encumbered with judgments and mechanics' liens to the amount of two or three thousand dollars, which encumbrances the trustees were compelled to remove, in consequence of which the trustees did not realize more than three-fourths of the nominal value of the property. The trustees therefore insisted in their answer that Hayden must share the fate of the other securities under the deed of trust, and that they were not bound to pay him the whole amount of the \$502 60 at the expense of the other securities, but only his rateable portion thereof.

Another position taken in their answer was, that if Hayden repudiated the trust deed, and denied his obligation to share the fate of the other securities, he then stood only in the place of Cornelius, and as Cornelius warranted the title of the property conveyed in his deed, against incumbrances, and incumbrances existed which they were compelled to remove, Cornelius could not compel the fulfilment of their contract in a court of equity. Cornelius being insolvent and a non-resident, was not entitled, as they insisted, to force the payment of the whole amount of the \$502 60, which they had undertaken to pay, without first making good the damages which they had sustained by reason of his breach of warranty. A court of equity would not turn them round to their action at law upon the warranty, when it was obvious from the fact of his insolvency and non-residence, that such action would be unavailing. And the trustees insisted that Hayden, the complainant, if he renounces the benefit or burthens of the trust understood between the securities, can occupy no other or better ground than Cornelius himself.

To sustain their position that Hayden actually consented to the disposition of Cornelius' property as understood by the other securities, the defendants introduced two witnesses, Woods and Todd, each of whom were grantees in the deeds from Cornelius, and parties to the trust deed made to Lamme and Payne. These witnesses were objected to, and exceptions taken to their testimony.

Woods testified that he was applied to by Hayden to know the partic-

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ulars of the deeds made by Cornelius to his creditors and of the arrangement about the property—that after inquiring of Payne and Harris, two of the parties, he told Haden the contents of the deeds, whereupon Haden stated that all he wanted was to fare as the other creditors did, who signed the deed. Witness informed Hayden that the property was to be divided pro rata among the securities, at which Hayden expressed himself well satisfied. Witness did not know of Hayden's being present at any of the meetings, or at the execution of any of the deeds.

Todd stated that he was present at two meetings of the securities, one in the night time at the counting house of Cornelius, and the other next morning—both previous to the execution of the deeds. Hayden was present at the last meeting, and had a good deal of conversation with some of the other securities, but witness did not recollect anything that was said.

The circuit court decreed that Hayden receive his proportion of the proceeds of the trust property, and the matter was referred to a master to state the account. From this decree Hayden appealed.

The witnesses, Woods and Todd, were called upon for the purpose of bringing the complainant within the terms of the trust deed to Lamme and Payne. It may be inferred from the several deeds which were in evidence, and indeed it is expressly admitted, that the securities of Cornelius, who were parties to those deeds, anticipating his insolvency, agreed to purchase his property at a price fixed upon by Cornelius. The price agreed upon was \$10,500, and the effect of the agreement was to extinguish that amount of Cornelius' debts. Whether the price of the property was beyond its actual value or not, was not material to them, as they were previously responsible for the debts the property was intended to liquidate. It was also clearly understood, and the terms of the deeds alone show this, that these securities, in the event the property did not bring the full amount of \$10,500, were to sustain the loss proportionately. It seems also that the complainant, who was also a security, was to be provided for, and the deed of trust which specifies the different sums, for which cash security had become bound, also recites the obligation given by the trustees, Lamme and Payne, to pay off a certain proportion of the note upon which Hayden was security. This obligation was executed, and Hayden's name does not appear in any of the transactions further than this. He was not a party to any of the instruments. The object of the complainant in this case was to avail himself of this obligation given to Cornelius, which he could only

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do in a court of equity. The testimony of Woods and Todd was designed to show that Hayden occupied the same position in the transactions which the other securities did ; that he was apprised of the character of the deeds and assented to them, and was willing to fare as the other securities. The result of this must be that the obligation of Lamme and Payne extended no farther than to give the complainant his proportion of the proceeds of the trust property. The bill, however, claims the full amount undertaken to be paid by the trustees, not subject to the losses sustained. The witnesses, who were two of the securities, and parties to the deeds, were then interested in subjecting Hayden to the same rule they admitted to be applicable to themselves, for if a decree was made according to the prayer of the bill, it would diminish to that extent the dividend of the other securities, of whom the witnesses were two. The defendants could surely not be liable in their individual capacity. The amount decreed must come out of the trust fund. The bill nowhere pretends to any such individual responsibility on the part of Lamme and Payne ; and if it did, the whole character of the transaction would sufficiently refute such a pretension. The transaction was all one ; the three instruments were all made on the same day, and to complete a single object. They must be construed together.

The testimony of these witnesses was not very important, nor did it tend much to establish the position which it was designed to prove. We would infer from the evidence of Woods that Hayden was not present until after the execution of the deeds, and yet Todd states that he was present at a meeting of the securities on the subject of Cornelius' insolvency, which meeting, it is presumed, took place before the arrangement was reduced to writing.

In one view of this case, we think it immaterial whether Hayden assented to the deed of trust or not. It may be important for his interest that he should place himself in this position, and the decree of the circuit court has given him the benefit of it ; but we cannot see any ground upon which he can come into a court of equity, repudiating the trusts, express and implied, of that deed. The defendants have given him no obligation upon which he can sue at law. He stands upon the naked paper obligation signed by the trustees and given to Cornelius. He must then avail himself of the relation he sustained towards Cornelius as a security, and in doing this he can share no better fate than his principal. It is most manifest that Cornelius could have no standing in a court of equity, if he were compelled to resort to that forum to en-

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force the obligation of Lamme and Payne. He is insolvent and a non-resident. He has sold property at the price of \$10,500 and warranted the title and covenanted against incumbrances. His covenants were broken, and incumbrances to the amount of two thousand dollars and upwards had to be paid. A court of equity would not, under these circumstances, turn the trustees round to a suit upon his covenants, which would be obviously unavailing, and permit him to recover the full amount of their obligation. The complainant then, if he seeks the benefit of this obligation to Cornelius, must make good the counter claims of the trustees.

If we lay aside the testimony of the witnesses in this case, which, as we have before remarked, is not very satisfactory, the most plausible interpretation which we can give to the written instruments executed by the parties is, that Hayden was to occupy the same position with the other securities. The only circumstance which militates against this construction, is the fact, so far unaccounted for on the record, that his name is not signed to any of the deeds. This may have happened in consequence of his absence, or it may have happened because, though present, he was unwilling to have any part in the arrangement. If the former hypothesis be the true one, and it is the one asserted in the answer, the decree of the circuit court was certainly right; and if the latter be selected as the more probable one, then Hayden, the complainant, stands merely in the shoes of Cornelius, and has no claims in a court of equity to the entire sum prayed for in the bill.

It is a strong circumstance in favor of the decree that the bill does not state any reason which operated on Cornelius and induced him to give the complainant a preference, not only over his general creditors, but over the other securities. A court of equity would not presume such a preference. Equality is equity. And yet the trustees could only be compelled to pay out of the trust fund the whole \$502 60 due upon the note to Cave, upon the supposition that Cornelius intended to secure the complainant a preference over all his other securities. Looking at the nature of the transaction, no motive could be assigned for such conduct, and none is suggested in the bill. So far as the character of the debt is concerned, the debt to Cave is not different from the others, nor is Hayden's position as security different from that of the other securities. If any motives of private friendship or other motive, not apparent, existed for this partiality on the part of Cornelius, such motive, it would seem natural, would have prompted Cornelius to have

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the preference indicated more plainly and conclusively than it was done in the papers drawn up between the parties.

We cannot see any injustice in the decree of the circuit court. The complainant is placed upon a foot with the other securities, all of them being preferred creditors of Cornelius. As he was no party to the arrangement by which this advantage was secured to him, he cannot come into a court of equity and claim the benefits of this contract, without sharing also the burthens and losses. Cornelius had undoubtedly a right, a strict legal power, to have placed him on safer ground than the others; but to effect this purpose his intentions should have been indicated by acts which admitted of only one construction: If he has left the complainant remediless at law, and under the necessity of calling on the assistance of a court of equity, he has left him in a position in which such a court will require the complainant to do equity, before it will interfere in his behalf. The court will indulge no presumptions in favor of inequality among creditors standing apparently on the same platform. The defendants have admitted the right of the complainant to his share *pro rata* of the proceeds of the trust property. For this share, the complainant has his decree, and we shall affirm it.

The other judges concurring, the decree is affirmed.

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1. When the owner of land upon which a State road is located, executes a grant, as required by the statute, the public *then* requires a right of way over it.
2. Upon the report of the commissioners or jury of the damage assessed in favor of the owner of land upon which a State road is located, he acquires a vested right to the amount, and is entitled to a warrant therefor, whether the road ever be actually opened or not.

APPEAL FROM BUCHANAN CIRCUIT COURT.

STATEMENT OF THE CASE:

By an act of the general assembly of the State of Missouri, approved January 14th, 1845,

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a State road was established from Weston, in Platte county, to St. Joseph, in Buchanan county, the route of which passed over the land of the appellant.

The commissioners, who marked out the road, awarded the appellant no damages, and at the next term of the county court, to which the report of the commissioners was made, he filed his objections to their assessment, and the county court thereupon ordered the sheriff to summon a jury of six disinterested householders of the county to examine the ground and reassess the damages. At the next term of the county court, the jury reported that the amount assessed by them in favor of the appellant, was two hundred and thirty-seven dollars and fifty cents, whereupon the appellant moved the county court to issue their warrant upon the county treasurer, for the amount of his damages and costs. The county court refused to do so; the appellant filed a petition in the circuit court for a mandamus, and a writ issued commanding the county court to issue the warrant, or show cause why they would not. The causes shown by the county court in their return to the writ, were "that the road had never been opened, or ordered to be opened; that the same was vacated by an act of the legislature at its last session; that all the proceedings of the county court for the assessment of the damages, and the proceedings of the sheriff and jury in relation to the same were illegal and void, and that the said Ross Wilkerson had never sustained any injury by reason of the location of said road." To this return the appellant demurred, which was sustained as to the petition, and overruled as to the return. To this opinion of the court the appellant excepted, and to reverse the judgment has appealed to this court.

GARDENHIRE, for appellant.

1st. The facts disclosed in the petition give the appellant a right to the amount issued in his favor by the jury.

1st. The settled and fundamental doctrine is, that government has no right to take private property for public purposes, without giving a *just compensation*. 2 Kent 339; 2 Johns Ch. Rep., 416; Henderson vs. Mayor &c. of New Orleans, 5 Miller Louis Rep., 416; Thompson vs. Grand Gulf, R. R., and Banking Company, 3 Howard, 240; Lyon vs. Jerome, 26 Wendell, 497; 12 Serg. & Rawles, 366, 372; 20 John's Rep., 745.

2d. The act establishing the road, provides that the "commissioners, the county courts, and those who may be liable to work on said road, shall in all respects be governed by the general road law now (then) in existence prescribing the mode of opening State roads, approved February 12, 1839." Private acts of 1845, 320.

3d. The 17th, 18th, and 19th sections of the act of 1839, provide for the assessment of damages, and prescribe the course to be pursued by the owner of land, in case he feels himself aggrieved by the assessment of the commissioners. Acts 1838-'9 107, 108.

2d. The remedy of the appellant is by *mandamus*. Treat vs. Middleton, 8 Conn. Rep., 243; Bloodgood vs. Mohawk and Hudson Railroad Company, 18 Wendell, p. 18; Davis Carpenter vs. the county commissioners of the county of Bristol, 21 Pick., 258; Harrington vs. county commissioners of Berkshire, 22 Pick. 268.

3d. The redress to which the appellant is entitled, consists in a just compensation for his property, *independent of the advantages or disadvantages of the road*.

1st. The just compensation to the owner for taking his property for public use, without his consent, means the actual value of the property *in money*, without any detention for estimated profit or advantage accruing to the owner from the public use of his property, speculative advantages or disadvantages, independent of the intrinsic value of the property, from the improvement, are a matter of set-off against each other, and do not effect the dry claim for the intrinsic value of the property taken." 2 Kent 339, 40, 41, and notes 9 Dana Rep., 114.

4th. The demurrer ought to have been sustained as to the return.

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1st. When a highway is once completely established, and the damages of the land once settled by the modes pointed out by law, the right of the land owner to his damages becomes vested, and is not effected by the subsequent discontinuance before the land is entered upon. Harrington vs. county commissioners of Berkshire, 22 Pick. 263; Westbrooke vs. North, 2 Green, 179; Thompson vs. Coffin, 4 N. Hamp., 517; 2 Metcalfe, 559.

2d. The third cause for not issuing the warrant is too general. It should have pointed out in what particular the proceedings in assessing the damages were "illegal and void."

3d. Whether the appellant was injured was for the jury, not the county court to determine. Acts of 1838-'9, sections 17, 18 and 19.

STRINGFELLOW, for appellee.

1st. The answer of the defendant shows that the road was never opened; that thus the plaintiff was never injured, and that the road had been vacated by an act of the legislature, so that he could never be injured, and therefore had no right to the damages assessed by the jury. Private acts 1844, p. 310; 1846-'7, p. 337-'8.

2d. The report of the jury is illegal, and their finding void. It was their duty to find the advantages as well as the damages to the plaintiff. They however enquired only into the disadvantages and damages. 9 Mass. R. 388; 2 Mass. 489; 1 Pick. 418.

3d. The county court has exclusive power to audit and settle demands against their county, and if at the time a demand is presented, the same ought not to be allowed, it is their duty to reject the same. Revised Code, title courts.

NAPTON, judge, delivered the opinion of the court.

One of the objections taken in the return to the conditional mandamus, is, that the jury did not take into consideration the advantages of the road to the petitioner Wilkerson, as well as its disadvantages. The order of the county court upon Wilkerson's complaining of the assessment by the commissioners, was "that a jury of six disinterested householders of Buchanan county, be summoned by the sheriff of said county, to assess the damages or advantages of said road to the said Ross Wilkerson, and make a report according to law," The jury reported "that after taking into consideration the damages and disadvantages of said road to the said complainant, and find the damages and disadvantages of said road on the said Ross Wilkerson's land, to be \$237 50," The statute requires the commissioners or the jury, in assessing the damages, to take into consideration the advantages as well as the disadvantages of the road to the person objecting. It was the duty of the sheriff to have the jury sworn, and we will presume that the law was complied with in this particular. It was the duty of the jury, in complying with the order of the county court, to consider both the advantages and the disadvantages of the road to Wilkerson. The return of the jury in this case, like the order of the court, is not drawn up with technical formal-

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ity; but it does not lead to an inference that they disregarded their oaths, or failed to comply with the law. They do not say that they took into consideration the advantages of the road to Wilkerson, nor that they failed to do so, and the presumption is that they did their duty. If the return was considered equivocal on this point, the county court had it in their power to ascertain the fact and correct the mistake, if any had been committed. The proceedings could have been set aside, and the jury again charged with the duty of ascertaining the damages. It was not Wilkerson's duty to object to the sufficiency of the return, if he was satisfied. But the return was received, and no objections are made to it on this ground.

It is highly probable that the term disadvantages, which the jury use in their report, was a clerical blunder. But whether this was so or not could have been easily ascertained by the court to whom the return was made.

The question comes up, it will be observed on a demurrer to the answer of the county court. The answer does not specifically point out any such objection as the one we have just noticed, but merely states that the proceedings in relation to this road, including the assessment and report of the jury, were all illegal and void. In what respects they were illegal, is not stated. This assertion would seem to be merely formal, and not deserving any particular examination. It is obvious that the real defence of the county court, and the only one relied upon, was "that the said road mentioned in said petition, had never been opened, or ordered to be opened, and that the same was vacated by an act of the legislature of this State, passed at the last session." This answer was filed on the first day of October, 1847. The report of the commissioners was received, and the road ordered to be opened on the 8th of July, 1845, as appears from the exhibits accompanying the petition for a mandamus. At the August term, 1845, of the county court, a jury was ordered to assess the damages done Wilkerson. Their report was made at the November term following. So much of this answer as relates to the act of the legislature, passed in the winter of 1846-7, nearly two years after the assessment of the damages, may be considered as totally irrelevant to the case. It will not be contended that if the road had been established and opened, the proprietor of the land over which the way passed, would have lost his right to damages by reason of the discontinuance of the highway. If a discontinuance at the end of two years would have this effect, then a discontinuance at the end of fifty years would have the same effect, and this cannot be.

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The only portion of the defence of the county court which presents any real difficulty, is the fact relied on by them that the road never was opened, and consequently that Wilkerson has not sustained any actual damage. This presents the question, as to the period of time, when the right to damages vests in the proprietor of the land. Does this right vest when the damages are assessed by the commissioners, and reported to the county court, or when the jury return their report, and that report is received or not set aside for informality or illegality, or must the proprietor wait until the road is actually opened? The act requires that the commissioners shall take a grant of the right of way from every owner through whose land the route of the road is located, and then provides that such grants shall vest in the public a right of way over a quantity of land on each side of the centre of the road, at least thirty feet in width. The commissioners are also directed to report the damages, and when any person is dissatisfied with their report, the county court is authorized to have a jury summoned to re-assess such damages, and if the damages found by the jury exceed those found by the commissioners, the court are directed "to issue a warrant on the county treasury for the amount of damages and costs. It would seem to be quite clear that the legislature intended the right of way to vest in the public, upon the execution of the grant directed to be taken by the commissioners, and the right to the damages to be vested in the proprietor whenever reported by the commissioners or by the jury. For the court upon this event is directed to issue a warrant. There is no direction that the court shall defer the warrant until the road is opened. The legislature evidently did not contemplate a case of this kind. They did not anticipate that the people of a district would apply to them for a road, have commissioners appointed to lay out the same, and after this had been done and juries summoned to assess the damages, the courts of the counties would then decline any further action, and wait until a succeeding legislature would repeal the law. The claim of the petitioner is certainly founded on *summum jus*, and it looks hard that the county should be compelled to pay for a thing which is of no use to them; a right of way which they do not intend to use. But this is like the case of any other person who purchases an article for which he discovers, after he has bought, that he has no use whatever. It is an indiscreet bargain, but I do not know that the courts have any power to relieve him from it. He is thrown upon the generosity of the person with whom the contract has been made. Upon the return or report of the jury in favor of the petitioner, Wilkerson, the public acquired a right

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of way over his land, and he acquired a vested right to the compensation agreed upon; but if the public did not see fit to avail themselves of this right, but their agents concluded it best to discontinue the highway, this does not effect the rights of the petitioner. When he demanded a jury, and the court ordered one, the statute made him responsible for the costs in the event that the jury gave him less damages than had been awarded by the commissioners. Would he have been relieved from the payment of these costs had this been the result of their finding in this case, because the county court saw fit not to have the road opened? Would such a defence have availed him, when an execution was levied on his property to collect these costs? Clearly not. If, then, the verdict fixes his responsibility in case it is against him, the county must be equally bound when the verdict is in his favor.

We observe that this question has been repeatedly decided by the courts of New Hampshire and Massachusetts. The proceedings in those States, preparatory to the establishment of a public highway, may be somewhat different from those prescribed in our statutes. But the cases distinctly recognise the principle that "by the judgment establishing and locating the highway, before any act done towards fitting it for use, the rights of the parties are fixed and vested," and the public acquire a right to the public easement as long as it shall be their pleasure to use it. And the right of the owner of the land over which it passes, to his compensation, is complete." 2 Met. 519; Hampton vs. Coffin, 4 N. H. 517.

The judgment of the circuit court will be reversed, and a mandamus awarded.

HUNTSUCKER vs. CLARK.

1. If a person obtain a certificate of purchase, for a tract of land, from the State land officers by fraudulent practices upon the rights of another, a court of equity will compel a transfer of the certificate thus obtained to the person defrauded.
2. If a person having a right to an estate, encourages a purchaser to buy it of another, the purchaser shall hold it against the person who has the right.

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APPEAL FROM BUCHANAN CIRCUIT COURT.

VORHIES, for appellant.

1st. This case, or the rights of the parties, has been adjudicated by the proper tribunal, and if the plaintiff failed or neglected to make his defence in that tribunal, chancery will not relieve unless some good excuse is shown for that failure, 1 Mo. Reps., 470; 10 Mo. Reps., 100.

2d. The rights of the parties having been decided by the register and receiver of the land office, who were the proper officers to adjudicate the matter, and the plaintiff in this suit having failed to appeal from the decision made by the register and receiver, cannot be relieved in this court unless he shows that he had a good defence, and that he was prevented from receiving the benefit of said defence in such a manner as to entitle him to a bill of review if the decision had been in chancery. See Story's Equity Pleadings, page 326.

3d. There is no case in the books in which a party was compelled to transfer his title to a purchaser from an apparent owner, where the purchaser, at the time of the purchase, was apprised of the title of the party of whom he afterwards complains, as in this case. Huntsucker was residing on the land, and Clark had full notice of his title, but relied upon a promise that he would not set it up. The title was not concealed, as was in all of the cases in the reports, but Clark blindly took his word that he would not set up a valid title. This is not a case of concealment of title. See 1 Vol. Johnson Ch. Reports, p. 344; 6 Vol. 166; 2 Story E. J., 634.

4th. The courts are bound to take notice of the law of the land, and by reference to the law in reference to the State lands, it will be seen that Huntsucker must either have paid one third of the purchase money for said land, or the same is forfeited to the State; in either case this decree is manifestly wrong.

5th. Courts of equity will never interfere prematurely in a case to make a decree that would be useless. This case ought to have stood until Huntsucker had obtained a right from the State, before a court of equity could interfere.

GARDENHIRE, for appellee.

1st. There was no concealment of facts in this case, and therefore could be no fraud. There was nothing but a failure to comply with an empty promise made without any consideration.

2d. And if upon any consideration at all, it was twenty-five acres of the land, including appellants improvements, which this decree does not secure to him.

3d. The appellant, as the law shows, has either made the first payment for this land, or his right thereto is forfeited; no return of his money is decreed, and if there be a forfeiture, the decree is idle and nugatory, such as a court never will lend itself to make.

4th. In cases of this kind, courts of equity will only interfere for the purpose of passing the legal title, which in this case is in the State.

5th. The decree must be based either upon contract between the parties, or upon an implied trust; in this case there is neither.

6th. Chancery will not compel a conveyance of the land in this case, on an assignment of his certificate, unless such certificate was obtained from the land office by fraud, which is not pretended in this case.

7th. Although the conduct of appellant in this case may have been sufficient to have stopped him in asserting his right in the land office. Yet the matter once settled there upon fair trial, a court of chancery has no right afterwards to interfere.

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NAPTON, judge, delivered the opinion of the court.

This was a bill in chancery. Clark, the complainant, states in his bill, that in the fall of 1842, one Jones had improved the S. W. qr. of S. 23, T. 56, R. 34, then being public land, and subject to pre-emption under the laws of the United States, and that Huntsucker, the defendant, was residing on the N. W. qr. of the same section, to which he had a pre-emption, and had also cleared and cultivated two or three acres on the first mentioned quarter; that the complainant, being a stranger, and desirous of purchasing land, was making inquiries in this neighborhood, when Huntsucker applied to him, and urged him to purchase from Jones the said S. W. qr., assuring him there would be no difficulty in getting a pre-emption, and securing a valid title; that the complainant accordingly contracted with Jones for his interest in this land, but before the contract was consummated he learned the fact, heretofore stated, that Huntsucker had in cultivation two or three acres upon this quarter; he therefore went to Huntsucker, informed him of what he had heard, and that this improvement might give him a pre-emption right, when said Huntsucker assured him that he had no claim whatever to said quarter, that he had no intention of setting up any pre-emption by virtue of his little improvement upon the same, if he had any; that he did not expect to be able to secure more than the quarter section on which he resided. Said Huntsucker, however, expressed a wish to continue the cultivation of the two or three acres thus cleared and fenced by him, on the said S. W. quarter of 23, until the produce of it should remunerate him for his expense and labor in fencing and clearing it, to which the complainant assented. The assurances of Huntsucker that he had no valid claim to this quarter, and that if he had, he would never assert it, or interfere in any way with Clark, the complainant, were repeatedly and distinctly given, and he was urged to purchase of Jones. The purchase was made from Jones for one hundred dollars, and the complainant took possession.

Subsequently this land, and the quarter section on which Huntsucker resided, was selected as State land, under the act of Missouri, February 27th, 1843. Clark, the complainant, settled in the S. W. quarter of 23, which he had bought of Jones, being the head of a family, and erected a dwelling house, and made other improvements, and on the 15th Oct., 1845, he applied at the land office at Savannah, in Andrew county, and proved up his pre-emption under the law of March 13th, 1845,

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and received his certificate. Afterwards, in the same month, Huntsucker had him notified that on a day named he would appear in the land office and claim his pre-emption by virtue of his cultivation prior to Clark's. Huntsucker did make the application, and obtained the certificate, and threatens to get the patent.

The bill prays that the court will compel Huntsucker to assign the certificate to complainant.

The answer of Huntsucker denies all solicitation on his part to induce the complainant to purchase, and states the fact to be that he, the respondent, had his dwelling house and improvements on said S. W. qr. of 23, and about seven acres in cultivation, although the principal portion of the farm was on the N. W. qr. of said section; that after the complainant had bought of Jones, he, the respondent, told the complainant that if he would secure him twenty-five acres, embracing his improvements, he would set up no claim to said S. W. qr., but the complainant refused. This was offered by way of compromise. The answer is long, and denies every allegation of the bill tending to show any fraud on his part.

The evidence in the case showed that Huntsucker settled in the neighborhood in 1840, before the land was surveyed, and that his dwelling house, and about five or seven acres of his farm, fell on the S. W. qr. now in controversy; that the larger portion of his farm was on the N. W. qr. and that he always declared his intention to claim the latter by pre-emption, and that he frequently expressed the opinion that this quarter would be as much as he would be able to pay for. Before Clark's purchase he had commenced a new house upon this N. W. qr., but did not remove from his old house on the S. W. quarter, until after the purchase of Clark from Jones. One or two witnesses were introduced by the complainant, who related statements made by the defendant after the controversy between him and complainant in the land office, and after this bill was filed, in which Huntsucker gives a statement of the conversation between him and Clark, corresponding very much with the charges in the bill. Huntsucker admitted in these conversations, according to one witness, that he told Clark he wanted the land on the S. W. quarter to a certain branch, about twenty-five acres, but Clark refused to make any such arrangement; that he afterwards proposed to Clark to abandon all but the seven acres he had improved, but Clark declined this, and said he would not buy unless he could get the whole quarter, whereupon Huntsucker told him to buy. Several witnesses proved that Huntsucker had disavowed to them all pretensions to

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the S. W. quarter, upon the ground that he designed claiming the N. E. quarter, and that this would be as much as he could pay for. One witness was present at a conversation between Clark and Huntsucker, just before Clark purchased of Jones, or immediately after, and, in this conversation, Huntsucker told Clark he wanted the piece of land up to the branch, (heretofore spoken of,) but Clark told him he could not make any contract with him, but was willing to make satisfactory arrangements after he purchased.

The circuit court made a decree in conformity to the prayer of the bill, and from this decree the defendant has appealed.

The principal objection to the decree in this case, is based upon a supposed assumption of jurisdiction by the court. It is contended that a court of chancery has no revisory jurisdiction over the decisions of the register and receiver, and therefore as these officers have given the certificate of pre-emption to the defendant, Huntsucker, the courts cannot disturb this decision. This position is maintained upon the authority of Lewis vs. Lewis, (10 Mo. R. 183.) That was a case arising under the pre-emption laws of the United States. Those laws, having required rights of pre-emption to be proved before certain officers, and to the satisfaction of those officers, it was thought that the courts had no right to interfere. They could not determine that a pre-emption under the acts of congress belonged to one person, when the officers selected by congress to determine this matter, had decided that the right was in another. But it was not held, in that case, that if, under the pre-emption laws of the United States, a pre-emption right was secured by fraud, or breach of trust, a court of equity would not afford redress. It was intimated that in such cases it might be premature to interfere with the incipient title, but it was not doubted that our courts would not suffer a title acquired through fraudulent practices from the officers of the federal government, to avail the owner, any more than they would protect such a title when acquired from a private individual. The case of Cravens vs. Bird, (1 Mo. R.) was an instance of the interference of our courts in a case of this character. Such interference does not proceed upon any assumption of a right on the part of the courts to revise the determination of the federal officers, but it is based exclusively upon an undisputed jurisdiction incident to all courts of equity, over the subject of trusts and fraud. The officers of the federal government, to whom is entrusted the sale of the public lands, have not been invested by congress with any judicial power, and questions of this character, if examined by them at all, cannot be settled definitively by these minis-

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terial officers. Such questions must be left to the judicial tribunals, and their determination does not involve any interference with that primary disposition of the soil which the compact between the federal government and this State has reserved to the former. It may be doubted, however, whether any question of this character could arise under the acts of congress securing pre-emptions to actual settlers. Under all the latter acts on this subject, such claims were not transferable. The privilege was confined to the settler alone, and it was not a privilege which he could transfer to another. No such fraud, therefore, as is charged to have been practiced by the defendant in this case, could have existed under the federal pre-emption laws. But the laws of this State, which have secured pre-emption to those who previously were entitled to them under the acts of congress, and to such subsequently acquired rights as are provided for in this act, have expressly declared these claims to be transferable, and have provided the mode of assigning them. The 13th section of the act of February 27th, 1843, declares that "all pre-emption rights under this act shall be transferable, and certificates of purchase money be transferred or assigned, and patents may issue in the name of the assignee." In this respect, pre-emptions under our State laws are materially different from pre-emptions under the laws of the United States. But there is another peculiarity in our law, arising out of the above provision, which restricts the powers of the State officers in deciding upon applications for pre-emptions. The 14th section of the act above referred to, provides that "when two or more persons claim pre-emptions on the same land as heretofore selected, or which may be hereafter selected, the right shall be deemed to be in him or her who shall have made the first settlement on said land, to be decided by the register and receiver of the proper land office; provided, that this section shall not be so construed as to apply to any case where the person who made the first settlement has *transferred or sold* his interest in or to said land, but in such case the right of pre-emption shall vest in the person then in possession of the same." The register and receiver are then governed by the first settlement, except where there has been a transfer or sale. It is apparent that these officers were not entrusted with any equitable jurisdiction; that they had no authority for investigating the circumstances upon which the present complainant relies for a title. The exercise of this jurisdiction on the part of the courts, presents no conflict of power, no assumption of any revisory control over the action of the executive officers but is based upon the supposition that these officers have discharged their duties correctly.

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It was clearly never intended that the register and receiver should constitute a court of equity, and have power to determine that the first settler, although he had neither assigned nor transferred his pre-emption, was yet to be regarded as a trustee for some other person, who by reason of the trust was the equitable owner. Such questions belong properly to a judicial tribunal.

The difficulty suggested in the case of Lewis vs. Lewis, of a premature interference with the title before a patent has issued, will not arise under our laws. The pre-emption right or certificate is treated under our law as a vendible title. The patent is by law directed to be issued to the person having the certificate, whether acquired by settlement or by purchase. The transfer of a certificate by a court of equity would place the assignee in a condition to obtain the title, and the action of the court would not be arrested upon a vague apprehension that the law would be violated by an executive officer. Under the federal pre-emption laws, a transfer of the privilege was treated as a fraud upon the law, and was expressly prohibited. Of course the patent issued to the pre-emptor, and to him alone. If the courts then undertook to make a transfer of the certificate of purchase, it could only be on the ground that the right of pre-emption had been wrongfully adjudged by the officers to whom the government had entrusted the duty of deciding upon these claims. But as the title still remained in the government until the issuance of a patent, its officers might choose to disregard the decision of the courts, and give the patent to the person to whom the subordinate officers had given the certificate.

This is a case, then, in which we think the courts have a clear jurisdiction, and it only remains to be considered whether the facts stated in the bill present a veritable case for its exercise. The general principle which governs cases of this character is well established. Where a man suffers another to expend money upon land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to assert it; or where a person having a right to an estate, permits or encourages a purchaser to buy it of another, the purchaser shall hold it against the person who has the right. It is a kind of equitable estoppel. The conscience of the person who thus encourages another to expend his money, under an erroneous impression which could be readily removed, is bound, and it would be promoting fraud and injustice to permit him to set up such claim. Wendell vs. Van Rensaeller, 1 J. Chr. 353; Reilly vs. Miami, Ex. Co.; 5 Ohio, 333; Buckingham vs. Dille, 10 Ohio, 288; Carter vs. Longworth, 4 Ohio, 384.

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But it is said that the defendant Huntsucker did not conceal his title, but merely promised not to assert it; and that this promise can only form the basis of an action for damages. The case, as disclosed in the bill, comes clearly within the spirit and meaning of the general rule we have alluded to. It is not literally a case of concealment of title, for the defendant had no title to conceal. The title to the land was, at the time of the alleged conversation between the parties, in the United States, and has since been transferred to this State. But it will be seen that the representations of Huntsucker, if we take them to be as described in the bill, had the effect of misleading the complainant, and inducing him to expend his money upon land to which the defendant had a pre-emption. It is true that the bill concedes that the complainant was apprised of Huntsucker's claim, but he must have known that his claim presented no obstacle to his purchase if Huntsucker had no design of entering the land. Whether this was the intention of Huntsucker or not, was known only to himself, and to advise the complainant to buy was equivalent to a renunciation of any preference he had in the purchase. His title, if the phrase be admissible, depended on his intention, and a concealment or misrepresentation of his intention was virtually a concealment of his title.

But little was said in the argument at the bar in relation to the weight of evidence. There is certainly no direct proof of any encouragement on the part of Huntsucker to this purchase of the complainant, but the circumstances are very strong to show that Huntsucker acquiesced in the unconditional purchase after failing to procure a promise from the complainant for a title to a small portion of the quarter section.

The testimony is decisive that Huntsucker, previous to the treaty between Jones and the complainant, had determined upon purchasing the quarter section upon which the larger portion of his farm was located, and upon which he was engaged in erecting new buildings for the accommodation of his family. This determination was repeatedly avowed to his neighbors. He admits, also, that he was aware of the negotiation between Jones and the complainant, and, although he denies that he encouraged the purchase, he admits that he did have conversations with the complainant on the subject. He admits that he consented that the complainant should purchase, but only on the condition that he was to receive a title for some fifteen or twenty acres, embracing the land upon which his first houses stood. Besides the fact that there is no witness to prove this conditional assent, there is one witness asserting positively to his own admission that Clark would not consent to such an

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arrangement. Probabilities would certainly favor the statement of the witness, and the other facts, clearly proved, go to confirm an unconditional assent. We shall therefore affirm the decree.

HICKS vs. CHOUTEAU ADMINISTRATOR OF CHOUTEAU.

1. The administration law of this State which prohibits an attorney at law from being taken as security upon an administration bond, is merely directory ; and was not designed to avoid the bond where the law has been disregarded.
2. Any competent evidence of the execution of a bond, however slight, will authorize the reading of it in evidence : whether the evidence is sufficient to prove its execution, is a question of fact for the finding of the jury.

APPEAL FROM JACKSON CIRCUIT COURT.

HADEN for appellant.

1st. That the circuit court erred in permitting the said plaintiff to read in evidence to the jury the said administration bond supposed to have been executed by defendant (as one of the securities therein) upon the proof offered and given by plaintiff of its execution. The verbal testimony of Swarengen does not show that Hix was present when he subscribed Hix's name to the bond. This was necessary, and that the same was done in his presence and with his consent, or by his direction, or that the instrument as a deed or bond, was made by Swarengen under an authority by an instrument of equal dignity in law, if done out of the presence of Hix, any other mode, if tolerated, would virtually put it in the power of another under a pretence of having a parol authority, to make a person a deed for his lands or penal bond charging him with any amount whatever. This cannot be law. Sec. 2, Greenleaf Ev. page 243, sec. 295; 1 Nev. & Man. 566. The witness does not pretend that he had a general authority to act for Hix, nor that he has any recollection of having a special authority so to do. A general authority is required to be proved, and why not a special one. See 1 Phillips Ev. 104-105 and authorities referred to.

2d. That the court erred in permitting the plaintiff to read to the jury the said transcripts of the records of the Jackson county court and every of them, as evidence against Hix. They were not evidence against him. He was no party thereto, and having had no notice actual or constructive of the proceedings therein ordered adjudged or had by the county court; they were no more evidence or binding upon him than any other judicial proceeding or act of a court, between strangers or others would be binding upon him or evidence against his rights. He cannot be presumed to have given his assent thereto because there is no evidence that he ever had any knowledge of what was being done or actually done by the court, until the record was read against him.

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STRINGFELLOW for appellee.]

1st. The evidence of the execution of the bond was competent and was sufficient to authorize the reading of the bond in evidence to the jury any competent evidence of its execution however slight authorizes the reading of a bond in evidence. It is then for the jury to decide upon the sufficiency of the proof. 8 Pick. 144; 2 Wash 58; 1 Einn. 420, 1 Coxe 10; 6 Serg. & R. 12; 2 Hay. 338.

2d. The statute prohibiting an attorney at law from being security on an administrator's bond is merely directory, and will not avoid a bond as to one who has executed such bond. 10 Peters 343; 3 Mass. 86; 5 do. 313; 14 do. 16, 7 Johns 549.

NAPTON, judge, delivered the opinion of the court.

This was an action of assumpsit brought by Cyprian Chouteau, administrator of Francis Chouteau, to recover the half of \$252 40, paid by said Francis as co-security with Hicks upon the administration bond of one Youcherein.

Only two points are presented by the record.

1. The defendant Hicks proved that he was an attorney and counsellor at law when his name was signed to the administration bond, and he relied upon the 16th section of the 1st article of the act concerning administration, which prohibits sheriffs, clerks and their deputies, and attorneys at law from being taken as security on such bonds, as discharging him from liability. This defence was overruled in the circuit court.

2. The proof of the execution of the bond by Hicks was also objected to, as insufficient to authorize the bond to go to the jury. The proof was this: John R. Swearengen testified that the signature of Hicks was not in the hand-writing of Hicks, but in that of the witness; that he had no recollection of having signed for Hicks, and remembered none of the circumstances attending the transaction; but he knew he would not have signed Hicks' name unless he had been specially directed by Hicks to do so, because he was not in the habit of doing such things. This witness further stated that if the defendant had directed him to sign his (the defendant's) name to the bond, he (the witness) should have done it, although the defendant might not have been present when he signed it. He further stated that he did not recollect whether the defendant was present or not when he, the witness, signed his name, nor had he ever heard defendant speak of the transaction since. Witness repeated that he knew he had authority to sign defend-

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ant's name, otherwise he would not have signed it, but he had no recollection of the circumstances.

Upon this evidence the circuit court let the bond go to the jury. Objections were made, and the point saved by bill of exceptions.

The plaintiff also read the order of the Jackson county court, approving of the bond of Youcherein taken in vacation before the clerk, with Russell Hicks, and Francis Chouteau as security.

As to the first point, we are of opinion that the section of our administration law, which prohibits an attorney at law from being taken as security upon an administration bond, is merely directory, and was not designed to avoid the obligation where the law has been disregarded.

The second point presents more difficulty. A deed is good, though signed by a third party in the name of the obligor, if done in his presence and by his direction. It is of no consequence that the obligor makes use of another man's hand in the execution of the instrument. *Rex. vs. Inhab. of Longan*, 4 Bem & Adolph 647. If there be any evidence tending to show the execution of the instrument, it is proper for the court to submit it to the jury, and they alone are to decide upon the weight of the testimony. Swearengen was a competent witness in this case, and, indeed, the proper witness to testify. He does prove that he himself put the signature of defendant to the bond, and he believes that this was done by defendant's authority. But unless this was done *in the presence* of the defendant, it was not his deed. Was there any evidence on this subject which would authorize the court to submit the deed to the jury? Swearengen has no recollection of the circumstances, and does not know whether Hicks was present or not. He does not give any impression, even, on this point; but says that he would have signed Hick's name as readily in his absence as in his presence, if he had been authorized by Hicks to do so. There is then a total absence of the slightest evidence on this point—not even the witness' belief as to whether Hicks was present or not. If, then, this fact be one essential to the validity of the obligation, and there was no evidence whatever in relation to it, I cannot see how the court could suffer the deed to go to the jury. There are many cases, especially in the decisions in Pennsylvania, which go very far to sustain the position that, if there be very slight evidence of execution, the deed may be admitted; but I have not seen any case which would resemble the present. Had the slightest evidence been offered from which a jury might have inferred that Hicks was present when the witness signed his name, I should be in favor of affirming the judgment.

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Opinion of the court by McBRIDE, judge.

If the evidence of Swearengen was sufficient to authorize the introduction of the bond in evidence before the jury (and I think it was) then, whether the bond was executed by Hicks, became a question of fact for the finding of the jury; and as the court was not called upon to lay down any legal rule to govern the jury in their finding, and the jury having found by their verdict that the bond was executed by Hicks, I am of opinion the judgment should be affirmed.

And judge Scott concurring, the judgment is affirmed.

REESE vs. SMITH EXECUTOR OF SMITH.

1. For a breach of the simple covenant of seizin, contained in a deed, the covenantee is entitled to damages equal to the purchase money and interest.
 2. For a breach of the statutory covenant of seizin of an indefeasible estate, contained in a deed, the covenantee can recover only nominal damage until the estate has been actually defeated or the right to defeat it has been extinguished.
 3. Where a covenant of seizin, contained in a deed, is broken and subsequently to the breach the covenantor acquires the title (if there be in the deed a covenant of general warranty by virtue of which the covenantee will, by operation of law, be vested with the subsequently acquired title) the damage can only be nominal.
 4. Where a covenant of seizin, contained in a deed, is broken and the covenantor dies before the defect of title is discovered, if his personal representative will procure a good title in himself, a court of equity will compel the purchaser to accept a conveyance from him.
- And will also enjoin a judgment at law, for the purchase money and interest, obtained on account of the breach of the covenant of seizin contained in the deed.

APPEAL FROM MARION CIRCUIT COURT.

CARTY WELLS for appellant.

1st. It is at least doubtful whether when there are express covenants in a deed, the words "grant, bargain and sell," can have the effect given them by statute.

Whether the making of express covenants does not indicate the intention of the grantor to make no others.

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Whether the express covenants do not operate as a limitation on those words and repel the idea of implied covenants.

2d. A covenant of *seizin* and power to sell, &c., are executed when the deed is delivered, and are then broken if ever. The specific execution of them is impossible. There is no precedent or an authority for a court's attempting to do so.

3d. There is no power in the court or even in the legislature to compel a party to accept any thing in lieu of the damages adjudged on a covenant broken on an executed contract and there is no precedent for the exercise of such a power.

4th. The covenant of "seizin," and the covenant of further assurance are separate and distinct covenants—wholly independant of each other, a suit may be brought for the breach of the one, whether the other be broken or not, and there is no power either in the party or in the court to substitute the performance of one for damages for the breach of the other, and for this there is no precedent.

5th. A covenant for "further assurance" is not complied with by making a new deed and conveying a new title. If the grantor had no title when he made his deed, he cannot further assure it.

To give further assurance, is to make a new deed or to remove some incumbrance.

6th. Complainant has at last conveyed no title to Reese.

The land originally belonged to Williams, who conveyed it to Lewis county.

The county court appointed Reddish a commissioner to sell town lots on the land.

He sold to McReynolds and could only convey to him.

He could not ten years after convey to complainant.

He had no title, only a power; and could only convey according to that power. The law gave him no such power.

Williams having conveyed to the county had no title left in him.

GLOVER & CAMPBELL for appellee.

In this case Smith contracted with Reese that he, Smith, (as we construe the contract) was seized of an indefeasible estate in the property conveyed, and that it was free from incumbrances, but that if this should not be the case as both parties supposed, the said Smith would make further assurances, that is, would make the title good. See R. Code 1835, the covenant for further assurance is a collateral security to the other covenants in the deed; is executory in its nature and equally the subject of a specific execution by both parties.

Specific execution may be had of all executory covenants touching real estate. 2 Tucker's Com. 462, specific performance will be granted after the time fixed for performance when the time is not material. 1 Sugden Top p. 502. At law the time fixed is always deemed material. 1 Sug. 491, but equity looks into the cause of the delay, and if innocent, holds the time not material. Ib. 495.

Where the vendee does not treat the time as material by insisting on performance at the time, it is regarded in equity as waived. 1 Sug. 498.

But if the vendor in case of default being urged by the vendee take no steps to comply, he cannot be aided in equity. Ib. 499. Where the vendor has been guilty of no gross neglect and brings his title after the day he shall be aiding. Ib. 501.

Where the time is not material and the title is bad, the vendor may perfect it and make the vendee take it. Ib. 502-3.

If no time is fixed, the vendor has a right to a demand from the vendee and the party who has not been in fault may afterwards procure the title. 1 Ib. 503; 1 Wheat 179; 4 Eq. Dig. 699, No. 5; 1 Marsh 160. Where either party fails to perform the contract according to its terms or time, a

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right of revision may be exercised by the other; but in that case the recinding party must give notice of his intention to do so. 1 Sug 261. Here is no case of revision or disaffirmance of the contract. The vendee, on the contrary, affirmed the contract by accepting a deed, and further affirmed it by bringing a suit not for the purchase money in a sumisset, by action of covenant on the contract itself. Smith committed no fraud. His representative, the widow, made no delay more than what grew out of the state of the title which was equally unknown to both contracting parties. Mrs. Smith on the notice given her had a reasonable time to comply with the covenant for further assurances: this was not allowed her, she was sued in an hour after notice given of a defect of title. This was in violation of the covenant to accept further assurances and the judgment at law was unfairly and unjustly sought on the covenant of seizin.

Specific execution of the covenant for further assurances will be decreed to the vendor. 2 Coke Sit. top p, 384-5; 2 Sugden 115-116; but the right to specific execution is a mutual right or it does not exist. 1 John Ch. R. 282; equity will not enforce one to take where it would not in a proper compel the other to give. 2 Tuck. 464.

The complainant at the suit of the defendant might have been compelled to procure the title, if she had it not, or to surrender any she might have had. Upon what principle then is it that when she has done what equity enjoins in the performance of the contract that the other party shall not be compelled to do equity by receiving it. 3 Mon. 312; 3 J. J. M. 54-55. The bargain was if this title is no good the vendor shall make it good; but there was no chance allowed to make it good till suit brought.

The appellant's position is, the covenant for further assurances is solely for the benefit of the vendee, then every title bond is only for the benefit of the vendee. The appellant says he had his election to waive his right upon this covenant and go upon the covenant of seizin alone; this is a right to annul a part of the contract. He contends that the covenant for further assurances is one on which he could elect to have damages or specific execution as he chose. But this cannot be, because the covenant of seizin of an indefeasible estate of inheritance covers all damages that can accrue, the covenant of further assurances is one therefore intended to secure the property in specie, like a title bond in the first instance, and being in fact a title bond for a title, if one is not conveyed by deed. If this be not the object of the covenant, it has none. It is thought that because this collateral title bond is in a deed the right of the parties are different; the answer is, the rule is general, all agreements for title to real estate are subjects of specific execution.

No hardship has fallen on appellant; he went into possession, improved the property, thus indicated his willingness to take the title if defective, when it could be got: was never disturbed in possession, remained in possession from the day of suit, Sept. 8, 1843, up to Jan., 1844, and until a title was tendered to him. He has suffered no injury and was only compelled by the decree to take the precise thing he contracted for.

NAPTON, judge, delivered the opinion of the court.

This was a bill in chancery to enjoin a judgment for damages obtained by Reese at law, upon the covenants in a deed conveying to said Reese a lot in the town of Monticello.

The bill, answer and exhibits, show the following facts:

In 1839, W. L. Smith sold a lot in Monticello for \$450, and he and his wife executed a deed for the same, containing the words "grant, bargain and sell," and also special covenants of seizin against incumbrances, good right and title to convey, and general warranty. In 1843

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Reese brought his action of covenant upon the covenant of seizin in this deed against Mrs. Smith, (the covenantor having previously died) who was the devisee of the principal part of the real and personal estate of W. L. Smith, and recovered the purchase money and interest as damages. He had given notice of the defect of title a day or two previous to the institution of the suit. Smith, it seems, had purchased the lot of one Davis, who was in possession at the time, and who had a deed from one Simpson, and the latter had also a deed from one Coffman. The last, it appeared, eventually had no title, legal or equitable.

So soon as Mrs. Smith was advised of the want of title in her husband, and the intention of Reese to sue, she instituted an investigation into the title, and ascertained that the lot had been sold originally at a public sale of lots in that village, by the commissioners of the county court, to one McReyolds, and that McReynolds had transferred his title and his evidences of title to one Penin. No deed had been made by the commissioners, but a memorandum of sale had been given. She accordingly procured from Penin a deed for his interest, and also an order upon the commissioner to make the conveyance to herself. This was done and a deed duly executed by the commissioner directly to Mrs. Smith and by her to Reese. The latter deed was tendered to Reese, but declined. This tender was made in January, 1844, before the judgment at law was obtained. This judgment was rendered at the June term 1844.

It appeared from the evidence that Mrs. Smith had used due diligence in procuring this title. It also appeared from both the bill and answer, that the value of property in Monticello, had greatly depreciated since the original purchase of Reese. It was also admitted that Reese had gone into possession immediately after the purchase, and had made some improvements, and that his possession had been undisturbed.

The complainant had a decree enjoining all the judgment at law except for the costs, and compelling the defendant to accept the title tendered.

The object of the covenants in a deed is to secure the title and possession of the property conveyed. The covenant of seizin is designed to secure the legal seizin of the land, and as it is framed under our statute, to secure a seizin of an indefeasible estate in fee simple. If the simple covenant of seizin be broken, the party is entitled to damages equal to the purchase money and interest, because if the covenantor

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had no seizin, the title has wholly failed, and the covenantee has paid his money without consideration. If our statutory covenant of seizin of an indefeasible estate be broken, the covenantor having had seizin, but of a defeasible estate, the damages will be nominal until the estate has been actually defeated, or the right to defeat it has been extinguished. *Collier vs. Gamble* 9 Mo. R. 466. The rule of damages in cases of breaches of covenants, is not an inflexible one, operating under all circumstances alike, but adapting itself to the real injury sustained. Hence where there is a covenant of seizin which is broken, and subsequently to the breach the covenantor acquires the title, if there be in the deed a covenant of general warranty by virtue of which the covenantee will by operation of law be vested with the subsequently acquired title, the damages can only be nominal. The covenantee is entitled to his verdict, but as he has actually got the title by estoppel, it would be gross injustice to return him the purchase money with interest, and at the same time suffer him to retain possession and title. The defence is available at law and may be given in evidence, not as a bar to the action, but in mitigation of damages. *Leland vs. Stone*, 10 Mass. R. 459; *Baxter vs. Bradbury*, N. H. In this case Smith, the grantor in the deed to Reese, was dead before the defect of title was discovered, and suit was brought against his personal representatives. The subsequently acquired title of Mrs. Smith could not pass to the grantee Reese, by virtue of our statute, or the common law principle which the statute recognizes, because Mrs. Smith, though a party to the conveyance, was not bound by the covenants contained therein. Had the grantor, W. L. Smith, acquired the title from the county of Lewis, before the trial of the action at law, such acquisition of title, as it would have passed, by virtue of our statute, directly to Reese, would have been admissible in mitigation of damages, and have reduced the plaintiff in that suit to merely nominal damages. But the present complainant, who was defending that suit, in her representative character, could not make such a defence. The covenant of general warranty would not pass her title to Reese, and a court of law had no means of compelling him to take the title. A resort to a court of equity was her only resource. She was forced to apply for a specific performance, and such is the object of the present bill.

In considering the question which is thus presented, it is important to keep in view the distinction between executed and executory contracts. The distinction is an important one, and has a most material influence in determining the discretion of the court, which is invoked

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in all applications for a specific performance. In the multitude of cases to be found in the reports on this subject of specific performance, the greatest confusion would be found to prevail, unless we keep in view those cases in which a contract for a conveyance is sought to be enforced, and those in which a conveyance has been made, and a covenant in the conveyance is sought to be enforced. In executed contracts, the courts will rarely rescind without proof of fraud. Where the vendee is put in possession and has his conveyance and is undisturbed, and the vendor, so soon as he is apprised of objections, seeks to remove and does remove them, a court of equity would hardly interfere actively to rescind. Whether the court would interfere with a judgment at law obtained upon a covenant in a conveyance, must depend upon the circumstances. Where the conveyance is executory and no deed has been made, it is equally rare for a court of equity to interfere, after the vendor has sued upon his contract and recovered damages at law. Unless the conduct of the purchaser has operated to some extent as a fraud upon the vendor, and lulled him into security when vigilance on his part might have prevented the difficulty, the court will not interfere. The only exception to this rule is when the delay in making the title has not resulted from the negligence of the vendor, but was occasioned by a defect which could not be remedied without the lapse of a considerable time, and that defect was known to both parties when the contract was made. Indeed, such cases can scarcely be considered an exception, for to insist on a conveyance at a particular day, when the vendee knew at the time the thing was impossible, and bought with a knowledge of the defect of title, is evidence of a want of good faith. Craig vs. Martin 3 J. J. Marsh 337. We shall therefore lay out of view all the cases which concern executory contracts, and with the understanding that the principles which govern the courts in enforcing remedies upon them are totally dissimilar to those which are applicable to executed contracts. The material facts proved in this case we understand to be these:

There was entire good faith on the part of the vendor, Smith. This is material, and we think, fully proved, not by any positive testimony, but by the circumstances of the case. The deeds from Coffman and wife to Simpson, and from Simpson and wife to Davis, and from Davis and wife to W. L. Smith, were all recorded, and Davis was in possession when Smith purchased from him. Smith took possession upon purchasing, and expended some money on the lot in making additional improvements. He, no doubt, believed his title to be good, and Reese, it

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would seem, was of the same opinion, and both parties were equally ignorant of the want of title in Coffman.

In the next place, it is worthy of observation that no question as to lapse of time arises in this case. There is no reason to believe that the defect in Smith's title was known to any of the parties in his life-time, and when it was discovered, no time was given to his executrix, the present complainant, to remedy the defect. There was no laches on her part, for the suit at law was commenced by Reese the very next day after the notice was given. Nor did any laches occur after the commencement of the suit. The suit was commenced on the 8th September, 1843, and the title obtained by Mrs. Smith from the commissioner was tendered the 1st of January, 1844. Less than four months was consumed by the complainant in her efforts to procure deeds from persons, some of whom lived in remote parts of the State. It is not very probable that any change took place in the value of the property during this interval.

It is a mistake to suppose that the suit at law upon the covenant of seizin, is to be regarded as a rescission or disaffirmance of the contract by Reese. Where a vendee has not received a deed, and sues upon the contract by which he is entitled to one, for the recovery of his purchase money, such suit is a disaffirmance of the contract, and it is in such cases that the authority of a court of equity to interfere is rarely exercised. But the suit at law in this case was upon a covenant in the conveyance, and a recovery in that suit would not prevent the covenantee from suing the next day upon any other covenant in the same deed. He is entitled to the benefit of all the covenants, and although it may be that a court of law would not permit him, after he had recovered upon one covenant the whole purchase money and interest, to get more than nominal damages upon another, yet this will not affect his legal rights to the benefits of all the covenants.

The bill of the complainant has two objects in view :

- 1st. To compel the defendant to receive a conveyance, and
- 2d. To prevent the defendant, after thus recovering the title, from collecting his judgment at law.

If the court can compel the defendant to receive the title, it needs no argument to show that the defendant, after receiving the title, should not be permitted to enjoy the estate under an indefeasible title, and at the same time retain the purchase money. Had the title been acquired by Smith, in his life-time, there is no doubt but that title would have passed from Smith to his vendee, Reese, and that if this had taken place

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before the trial of the action on the covenant, it would have restricted the plaintiff to nominal damages. It is said that a court of equity cannot compel a covenantee to accept performance in lieu of damages, after the covenantee has elected to take the latter. But a court of equity in exercising such a power, would only be following the law, and if the covenantor acquires his title after the suit at law has terminated, what could prevent a court of equity from taking notice of what the silent operation of our statute of conveyances would do without the intervention of any court? Would a court of equity, under such circumstances, allow the covenantee to pocket his damages and also retain the land? And can it make any difference in principle that the after acquired title has been through the personal representative and not through the covenantor himself? It is the act of God alone which has produced this change in the situation of the parties.

The fact that this property has very much depreciated in value, is the strongest circumstance in the case against the exercises of equitable interference. Had the contract been executory, it would, perhaps, taken in connexion with the lapse of time, be conclusive against the bill. But it must be observed that in this case, the question is not whether the vendee shall be compelled to complete a contract and take a conveyance for land, which he agreed to take when land was worth much more than it is now. The contract has been made and the conveyance accepted, and possession taken and enjoyed without disturbance. The vendee, having his deed, with covenants of general warranty and seizin and for further assurance, could undoubtedly compel the vendor to convey any subsequently acquired title to him. He may sue on the covenant of seizin and recover damages, but, if he prefers, he may still resort to his covenant for further assurance or general warranty. The remedy is then reciprocal. Had the property risen in value, the vendee could unquestionably have forced the title from the vendor, had the vendee acquired any subsequent to his conveyance.

The case of Cotton vs. Ward (3 Mon. 312) is not unlike the present, and is a decisive expression of opinion on the part of the Kentucky court of appeals in favor of the exercise of such a power by a court of chancery. Cotton had conveyed the title to Ward, and put him in possession, and having obtained a judgment against him for a part of the consideration, Ward enjoined it for alleged defects in the title. Pending the injunction, Ward brought his suit at law for a breach of the covenant of seizin, and recovered damages. Cotton filed a cross-bill to enjoin this judgment, and being able to exhibit, at the hearing, a

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perfect title, Ward's injunction was dissolved, and Cotton's perpetuated. Whereby Ward was compelled to take the title and give up his judgment for damages.

As to the idea that a court of equity will never interfere after the vendee has exercised his privilege of electing damages at law, this, we have seen, is not so. Even in executory contracts, the authorities are numerous where the vendee has been compelled to give up damages recovered upon a rescission of the contract in a suit at law, and accept performance in lieu thereof. This is usually done, and indeed always done, where time is not of the essence of the contract, and the lapse of time has not arisen from any default of the vendor, and the situation and value of the property has not materially changed. And if this will be done in executory contracts, there is much more reason why the power should be exercised where the contract has been executed.

In relation to the sufficiency of the title offered in this case, we suppose there can be no question. The deed from the commissioner of the county, executed in pursuance of a written transfer of the equitable title from Penin, conveyed the legal title which was in the county of Lewis, to Mrs. Smith.

Judge McBride concurring, the decree is affirmed.

SCOTT, judge, dissenting.

The defendant having recovered a judgment at law for a breach of the covenant of seizin, the regularity or propriety of those proceedings cannot be revised by a bill in equity. If the damages recovered are greater than the party was entitled to, that alone is no ground for relief. There are no circumstances stated in the bill which, in my opinion, are sufficient to warrant the interference of a court of equity. If relief is granted in this case, then in every case of the recovery of damages for a breach of the covenant of seizin, the vendor at his option may procure a title or pay the damages according as the property has fallen or risen in value.

WILKSON et al vs. STATE OF MISSOURI, to use of STONG and others.

WILKSON ET AL VS. STATE OF MISSOURI, TO USE OF STONG AND OTHERS.

1. Appellant, who was an administrator, agreed with the appellee to let a judgment be rendered against him in the circuit court for a certain amount, with the understanding that it should be credited with such amount of offsets as the county court of the county shall thereafter allow him upon a settlement to be made. Upon the facts of the case, the circuit court stayed execution of the judgment, except as to the sum of \$176 73, which judgment is affirmed.

APPEAL FROM JEFFERSON CIRCUIT COURT.

JOHNSON, for appellants.

1st. According to the contract produced in evidence, the judgment should have been credited with the amount allowed Wilkson by the county court, and as the appellees issued execution when the judgment was satisfied, the execution ought to have been quashed.

2d. Although the county court found Wilkson indebted to the estate in the sum of \$176 73, yet the record of the settlement shows that the court charged Wilkson with \$187 85 which accrued since the date of the orders on which the suit in the circuit court was founded.

3d. Had Wilkson insisted upon his credits in the circuit court, this charge, accruing since the date of the orders in the county court, could not have been given in evidence under the plaintiffs declaration, and therefore cannot be taken into account to create a balance to be collected on execution.

4th. The order of the court leaves the lien of the judgment for the whole amount, when according to the contract the execution should be quashed and satisfaction entered.

5th. The bill of the appellees is not evidence; it was not sworn to, and is to be taken merely as the suggestion of counsel. Doe vs. Lybourn, 7 Term Rep., p. 2 & 3.

6th. The statement of appellees counsel that there was shown him a paper containing an account of negro hire which he did not recollect had been taken into account by the county court, is too uncertain to impeach that settlement, as the proof shows that all the parties interested were present; that every item was scrutinized, and that the court were engaged nearly two days in the settlement.

FRISSELL, for appellees.

The defendants in error insist that the court below committed no error.

NAPTON, judge, delivered the opinion of the court.

This was a motion before the Jefferson circuit court to have satisfaction entered upon an execution. A suit had been brought in 1846, in the name of the State, to the use of Solomon Stong, Stephen Shore, and Jane Shore, against Anthony Wilkson and his securities, upon his bond

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as administrator of the estate of David Stong, deceased. On the 28th May, 1847, the parties to this suit entered into the following agreement: "Whereas, a suit is now pending in the Jefferson circuit court, in favor of Stephen Shore and Jane Shore, formerly Jane Stong, and Solomon B. Stong, by S. Skeel, his guardian, against Anthony Wilkson, as principal, and H. J. Bates and Andrew Fight, as securities, upon the official bond of said Wilkson as executor of the last will and testament of David Stong deceased; and whereas said Wilkson was displaced as executor of said estate, and Samuel Skeel appointed administrator with the will annexed of said Stong's estate; and whereas said suit is brought upon certain orders of the county court of said county, to pay money to the heirs of D. Stong deceased, and upon other orders, and whereas said Wilkson has now finally settled up his executorship with the county court of Jefferson county, and has many credits which he conceives ought to be allowed him. Now it is agreed between the parties aforesaid, (naming them :)

1. That said Wilkson agrees that judgment may be rendered against him and his securities in the suit, for the just amount that may be established against him, and he will not claim any credits against said amount in said circuit court :

2. In consideration whereof the said S. Shore, and Jane his wife, and S. B. Stong, by S. Skeel, his guardian, and S. Skeel administrator de bonis mon &c., agree that A. Wilkson may establish his credits, payments and offsets before the said county court of Jefferson county, and, upon a settlement before said court, whatever balance is allowed in his favor, taking into consideration the judgment rendered in the circuit court, the parties aforesaid agree that the same shall be credited on the judgment entered in their favor in the circuit court, and the said Samuel Skeel, administrator, &c., agrees to waive notice upon the claims and demands of said Wilkson, against the estate of said deceased, in order to facilitate the settling of their differences, and save expense. It is further agreed the execution be staid until after the next term of the circuit court. Signed &c." A settlement was made before the county court, in which the court found Wilkson chargeable with \$2,363 at the settlement in 1842, and with \$187 85 since that time, making the aggregate of \$2551 79; and found him entitled to a credit of \$2375 06, on account of disbursements, &c., leaving a balance due the estate of \$176 73.

Immediately after this settlement a bill of complaint was filed in the circuit court, in chancery sitting, to set aside this settlement, charging

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fraud and mistake upon Wilkson. This bill was given in evidence on behalf of the heirs of Stong, on the hearing of the motion to quash the execution.

The circuit court ordered the execution to be stayed, except for the sum of \$176 73 and costs. From this order an appeal was taken to this court.

The appellants contended that under a proper construction of the contract between the parties, Wilkson was entitled to a credit on the judgment of \$2,375 06, that being the amount allowed him for disbursements by the county court, and, consequently, that the execution for the \$1,895 75, should have been quashed. We do not put this construction on the contract, but suppose it was the intention of the parties to take into consideration what the county court should find Wilkson to be indebted to the estate, as well as the credit side of the account. The amount of the judgment was supposed to be sufficient to cover the actual deficits of Wilkson, and perhaps to exceed it, and therefore it was agreed to restrict the execution to the amount actually found due from him to the estate. It is suggested that the charge of \$187 85 against Wilkson, which had originated since the settlement of 1842, should be excluded, as the suit was brought to recover the amount of orders before that period. In relation to this it is sufficient to say that the proceedings upon which this judgment for \$1,895 75 was based, are not before us, and form no part of the record. We know nothing of the claims which led to the judgment.

The circuit court was certainly right in suspending the execution until the determination of the proceedings to set aside final settlement. This proceeding showed that such final settlement had not been made. As there was no dispute about the indebtedness of Wilkson to the amount of \$187 85, the execution was rightly permitted to go for that amount.

Judgment affirmed.

POLK vs. FARAR et al.

POLK vs. FARAR ET AL.

1. If an administrator's account, on a settlement before the county court, shows that he has no cash, but only property in his hands, and the court makes an order that all demands of a particular class be paid, it is upon the implied condition that funds sufficient for that purpose first come into his hands; and a creditor of that class, who sues out a *scire facias* to compel payment of his demand, must show that the property has been converted into cash.

APPEAL FROM FRANKLIN CIRCUIT COURT.

STATEMENT OF THE CASE.

This was an action commenced in the county court of Franklin county, by William Polk against Elizabeth Farar and her securities, as administratrix of the estate of John S. Farar, deceased, under the provision of the administration law permitting the issuing a *scire facias* in certain cases.

Dr. Polk had presented to the county court for allowance against John S. Farar's estate, two demands for medical services, and they were allowed at the May term, 1846. One was for fifty eight dollars, and was classed in the second class. The other was for about sixty dollars, and was put in the fifth class.

At the next February term of the county court, the administratrix was ordered by the court to pay all demands allowed against the estate up to the fourth class. This included one of the allowances in favor of Dr. Polk.

Demand was made of the administratrix for the payment of this demand in the second class the payment refused.—An execution was issued against the administratrix—a return of no property found made by the sheriff, and thereupon a *scire facias* issued against the securities, which was served, and upon the trial the court gave the following judgment:

"It is ordered by the court that the said plaintiff take nothing by his said suit, and that the proceedings in said case be rescinded and dismissed, and that the said defendant recover &c."

The defendants appealed from this judgment to the circuit court.

On the trial in the circuit court the cause was submitted to the court, and the court found for the defendants. An appeal was taken to this court upon a motion for a new trial having been overruled.

1st. The evidence for the plaintiff was as follows: first the bond of E. Farar as administratrix with L. W. Draw and others as her securities.

2d. The record of the allowance of the demand in favor of Dr. Polk against John S. Farar's estate in the 2d class.

3d. The record of the order of the county court ordering the administratrix to pay all demands up to the fourth class.

4th. The demand of payment made by Dr. Polk before the issuing the execution.

5th. The execution and the return of the sheriff thereon—no property found &c.

6th. The first and second annual settlement of the administratrix; the first made at the May term, 1846, in which she is charged with the sum of \$2,149 26, and the second made in August, 1847, in which she is charged with \$2,257 77, the balance in her hands at this settlement.

7th. The inventory of the estate, by which it appeared that the cash on hand, and eviden-

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ces of debts due the deceased, amounting to \$2,142 27, and the sale bill amounting to \$267-95.

It was also proved that Elizabeth Farar had received cash on a mortgage to the amount of \$226 prior to the demand being made.

This was the substance of the evidence given by the plaintiff though not in the order that it appears upon this record.

The defendant proved by J. Farar (who was objected to on account of interest, he being a distributee, but the objection was overruled by the court) that he was agent for the administratrix. That he had no notice of the intended application of Polk to the county court for an order for the payment of the debt in the second class, until he was shown the execution upon it by the sheriff; that no debts in the second class had been allowed but this and funeral expenses paid. That he had previously paid debts to the amount of some \$500 in notes belonging to the estate, but it did not appear that any money had been paid by him or the administratrix. He also stated that the administratrix had no appreciable amount of money at the time of said order.

Upon this evidence the court gave judgment for defendants.

FRISSELL, for appellant.

The plaintiff relies upon the following points:

1st. That the county court had no authority to set aside the order for the administratrix to pay the demand allowed against the estate up to the 4th class at a term subsequent to the making the order.

2d. That the administratrix was bound to pay the demands against the estate according to the class, paying the whole of a prior class before she paid any part of a subsequent class.

3d. That the evidence showed cash funds in her hands belonging to the estate more than sufficient to have paid this demand allowing she had collected no part of the proceed of the sale. Stat. of Mo., 1845, page 98, sec. 11, 12, 13, 14, 16.

NAPTON, judge, delivered the opinion of the court.

In this case the county court of Franklin county had made an order upon the defendant, who was administrator of the estate of Farar, deceased, to pay all debts allowed up to the fourth class. Among these, and in the second class, was the claim of Dr. Polk for medical services. Upon this claim a demand was made, and an execution issued, which being returned *nulla bona*, a scire facias was sued out against the securities. Upon the trial it appeared, from the testimony of a son of the defendant, that she had received no money, and that the settlements made by her, and which represented her to have received several thousand dollars, were only based upon the inventory and sale bill. The court therefore rescinded the order to pay the plaintiff's demand, and gave a judgment for the defendant. The same result took place upon a trial in the circuit court.

When administrators make a settlement, they charge themselves with

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the amount of the sale bill, and with evidences of debt, and other things not available, as cash. The court seeing from the exhibit of the condition of the estate, and seeing that it will be ample to satisfy all demands of a particular class, make an order that they be paid. This must be under the implied condition that funds sufficient for that purpose must first come to the hands of the administrator. The administrators account shows that he has only property and effects in his hands, and he who sues out a scire facias, must show the fact that the property has been converted into cash. The settlement in this case does not show that sufficient money was in the hands of the administrator at the time of making the general order for the payment of the demands of the second class.

The other judges concurring, judgment affirmed.

BURRIS vs. PAGE.

1. A conveyed, by deed, a tract of land to B, (the wife of C) "and to the heirs of her body," "habendum to her and the heirs of her body." B and C had four sons and one daughter. B died. Held
1. That by the common law the deed conveyed to B an estate in fee-tail; but by the 4th section of the act concerning conveyances, Rev. Code 1825, she took only a life estate in the premises: and that upon the death of B, her husband did not become tenant by courtesy.
 2. Upon the death of B, the first donee—plaintiff, who was the eldest son of B and C, became entitled to the premises "according to the course of the common law."

APPEAL FROM WASHINGTON. CIRCUIT COURT.

STATEMENT OF THE CASE.

This was an action of ejectment brought by James D. Page, who is the eldest son of James M. and Sybill H. Page, against David Burris, for a tract of land containing 80 64 acres, lying in Washington county. On the trial, the attorneys for the parties made a case for the opinion of the court. The facts agreed upon are as follows: That Samuel C. White was, at and before the commencement of this suit, guardian of James D. Page, having been appointed by the county court of Washington. That James D. Page, the plaintiff, is the eldest son of Sybill H. and James M. Page, who, prior to the date of the deed hereafter mentioned, had been

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lawfully married. That James D. Page was born on the 21st November, 1831; that Sybill H. Page, the wife of James M. Page, died on the 27th September, 1843; that the premises sued for and described in the declaration, are the same conveyed by Benjamin Horine and Catherine his wife, (in whom was the fee,) to Sybill H. Page, by deed bearing date the 20th April, 1833, which deed was considered as part of the agreement. In this deed the said Horine and wife, for the consideration of natural love and affection, and the further consideration of one dollar, conveyed to Sybill H. Page, their daughter, formerly Sybill H. Horine, and to the heirs of her body, the lands sued for, habendum to her and the heirs of her body. It was further agreed that James M. and Sybill H. Page, had besides James D. Page, who is the eldest, four boys and one girl. It was further admitted that the defendant David Burris obtained judgment against James M. Page, the husband of Sybill H. Page; that execution issued; that the land sued for was levied on and sold by the sheriff; that at said sale the defendant became the purchaser of said land, and that the sheriff executed and acknowledged to said Burris a deed for said land, by which he acquired all the right and title of James M. Page that said Page acquired in virtue of his marriage with Sybill H. Page. It is further admitted that the defendant commenced an action of ejectment against James M. Page on the 25th August, 1843, who was at that date in possession of the premises sued for, and on the 1st May, 1845, there was a judgment of possession in favor of said Burris, and against said James M. Page, by which he got possession. That said defendant before and at the commencement of this suit, was in possession of the premises sued for, and that he is now in possession, and that Burris has no other title than that which he acquired by the purchase of James M. Page's interest.

Upon this state of facts, the court rendered judgment in favor of the plaintiff, and assessed his damages. The defendant moved for a new trial, which being overruled, he appealed to this court.

FRISELL, for appellant.

The only question for the consideration of the court, is, whether James M. Page was entitled to the possession of the premises by virtue of his marrying with Sybill H. Horine, having issue by the marriage, the said Sybill being seized of the land at her death.

The whole matter must turn upon the construction the court shall put upon the 4th section of the act approved February 14th, 1825, regulating conveyances. Rev. Stat. of 1825, page 216.

The object of the legislature in passing this law, was clearly to put an end to entailed estates. It was not the intention to deprive the husband of his courtesy nor the wife of her dower.

The construction of the statute which would cut off the tenant by the courtesy, would where the land was conveyed to the husband, and the heirs of his body deprive the wife of her dower.

The wording of the law appears to have been very guarded; the donee becomes a mere tenant for life, and the remainder passes on his or her death to the person or persons to whom the estate tail would on the death of the first donee in tail first pass according to the course of the common law.

At common law the remainder would pass first to the husband, if living, if dead, then to the eldest son, if there be a son, if no son then to the daughter.

It was obviously the intention of the legislature by this section of the law not to change the right of possession or enjoyment of the estate as to any person in being at the time of its creation, but merely to change the nature of tenure.

Remainder as applied to estates used in different cases. 2 Fearn, 110; 1 Fearn, 3 Note c;

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Rules for construction, 1 Chitty, Black 40, 41. Rule in Shelley's case, 2 Ferre. on Rem., 207, 208, side p. 471, top page 228.

The laws of most of the States respecting entails, converts the estate tail into a fee. Our law upon this subject is different from that of any other State so far as I have examined.

JOHNSON, for appellee.

1st. This is a conveyance to Sybill H. Page, and the heirs of her body habendum et tenendum to her and the heirs of her body. The estate created by this deed is therefore a fee tail general at common law. Thomas Coke Littleton, Volume 1, Top paging 597, 601 et seq; Cruises Digest, Vol. 1, p. 78, sec. 13; Bacon's Abridgment, Vol 2, side paging 544 et seq.

2d. The statutes of 1825, Vol. 1, page 216, section 4, enact: "That in cases where by the common law any person or persons would now be, or might hereafter become seized in fee tail of any lands, tenements, or hereditaments, by virtue of any devise, gift, grant, or other conveyance heretofore made, or hereafter to be made, or by any other means whatsoever, such person or persons instead of being or becoming seized thereof in fee tail, shall be deemed and adjudged to be and become seized thereof for his or her natural life only, and the remainder shall pass in fee simple absolute to the person or persons to whom the estate tail would on the death of the first grantee, devisee or donee in tail, first pass according to the course of the common law. This statute is substantially continued in the revision of 1835, p. 119, *Ex instanti*, that this fee tail is created by deed, this statute steps in and cuts down the estate tail to an estate for life in Sybill H. Page, with remainder in fee to those to whom the estate tail would have passed, (had it not been cut down) according to the course of the common law.

3d. Our statute cutting down the estate tail created by deed, to a life estate only in Sybill H. Page, there is no tenancy by the courtesy in her husband James M. Page, for there is no tenancy by the courtesy in a life estate. Chitty's Blackstone, Vol. 2 p. 99; Thomas Coke, Vol. 1, top paging 648, and note E, where it is said to make a tenancy by the courtesy, the wife must be seized of an "inheritance freehold," which an estate for life is not.

4th. On the death of Mrs. Page, the fee passed under this statute as it would have done according to the course of the common law, that is to James D. Page, the eldest son the present plaintiff. Chitty's Blackstone, Vol. 2 p. 162 and 171; Thomas Coke, Vol. 2 p. 204, and note S; Cruises Digest, Vol. 3, p. 377, as a legislative interpretation of the statute upon this point. See Rev. Stat. of 1845, p. 219, St. Ed.

5th. As Mrs. Page had only a life estate, her husband James M. Page could not be tenant by the courtesy, and therefore Burris acquired nothing by purchasing Page's interest, and he is therefore a mere trespasser.

SCOTT, judge, delivered the opinion of the court.

We see no room for doubt in this case. By the 4th section of the act concerning conveyances, Rev. Code 1825, Sybill Page took a life estate in the premises conveyed to her. The deed conveyed to her an estate in fee-tail, and by that statute she took only a life estate with remainder in fee to those to whom the estate would have passed on the death of the first donee according to the course of the common law. Whether it was intended or not, both dower and courtesy are necessarily barred

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as the first donee takes only a life estate, a tenure to which neither dower nor courtesy is incident.

The other judges concurring, the judgment will be affirmed.

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1. If an execution be issued upon a judgment, and levied while the judgment is a lien upon real estate, the effect of this is to continue the lien and its priority until the writ is executed; although before it is executed, the time during which the judgment is a lien, had elapsed.

ERROR TO MARION CIRCUIT COURT.

GLOVER & CAMPBELL for plaintiff.

1st. The lien of a judgment without revivor expires by the express proviso of the statute at the end of three years. See R. Code 1835 p. 339. The lien of the judgment is a right created by the statute, and cannot be extended further than the statute goes. 9 Wendell 158; 5 Cowen 294; 18 Wendell 622. In New York it will be seen by the authorities quoted that the provisions of the New York statute except from the computation of the period of the lien, any portion of that period in which there may have been enjoined by some order in chancery against proceeding.

No such provision is contained in the statute of Missouri. The words are "liens shall commence on the day of the rendition," and shall continue for three years. It is not said they continue longer; unless revived, of course they do not. If it was designed by the law giver to continue it longer by issuing execution, he would have said *execution*, and not scire facias. The instruction of the court is directly in the teeth of the statute. The statute says it may be continued by scire facias; the court says it may be continued by execution. The statute has no exception in it, the court says the failure of the court to sit is an exception. The failure of the term is not hardship on the judgment holder, he should have taken his scire facias. By the law of New York it appears the judgment does not cease to be a lien against the judgment debtors, the lien ceases only as to the third person; by *our law* the lien ceases as to the defendant in judgment. 7 Cowan 540.

The circuit court regarded the case in 1 Cow. 495, which declares the lien extended by execution taken out as an authority in point, but that case went upon a provision in the statute in force at the time. By *our* statute the scire facias is the only means of extending the lien.

2d. The lien of the plaintiff's judgment was revived and continued for two years by suing out a scire facias before the expiration of the three years, the same having been regularly prosecuted to judgment afterwards. R. C. 1835, sec. 6-7 and C. 10, 1 Gilman R. 644; 2 Tuck. Com. 375-6; 2 Am. Chy. Dig. p. 10, No. 49.

3d. The evidence introduced by the plaintiff showed a right of recovery in the plaintiff against

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the defendants if the foregoing propositions are correct. Here the plaintiff purchased all the interest of Wm. Wright, but Wm. Wright has transferred that interest in defiance of law to Bates, and Bates has so transferred it to Wells; under the circumstances it seems to us the circuit court ought to have held the possession of Bates and Wells the possession of Wright. 1 Wendell 317; 6 John R. 3-4 5; 10 Johns R. 291-2; 18 Johns 7; ib. 92. The doctrine of this court has been affirmed by this court—5 Am. R. 43.

4th. The lien of the execution is a different thing from the lien of judgment, commences only when the sheriff comes to the hands of the officer, (A. C. 1835, sec. 8, p. 256) exists whether the judgment has a lien or not, and may be determined on principles peculiar to itself. See Wise vs. Darby 9 Mo. R. 131; we know of no principle by which two liens existing contemporaneously can.

5th. The statute upon the subject of the lapse of term of court will not save the defendant's right. The plaintiff took his scire facias, and the same remedy was open to the defendant. He refused to resort to it. He knew the court had lapsed, and that it constituted no exception in the statute, but still refused. The hardship of which he complains is the result of his delay for two whole years to execute his lien, and his refusal to revive it under the statute. The judgment lien in this case is not embraced by the words of this statute. The legislature has the power to make the process of the courts returnable to such courts as they choose, but whether the legislature could extend this judgment lien is a graver question.

PRATTE & ANDERSON for defendants.

1st. The levy of the execution upon the land during the lien of the judgment, created a lien which gave precedence, and could not be lost by the lapse of a term of the court.

2d. The plaintiff's judgment in scire facias did not revive the lien as to his original judgment, it being a new judgment for a certain sum, and execution awarded thereon. It could only enforce itself and not relate to any other judgment.

In 2 Croke 73, a sheriff had seized goods which were not sold nor execution returned, and sheriff dismissed from office, and afterwards the ex. sheriff sold the goods—courts say that the execution was an entirety, that it gave him authority to sell without any other writ and the sale good. This has ever since been the law, that when a levy is made during the life of an execution, no venditioni-exponas is necessary, but the sale be made on the execution that was levied, as by virtue of that levy it is sold, the writ of ven. exponas merely going to sell what has been heretofore levied on.

The session act's of 1842-3, at page 54, says that no recognizance, suit, or other matter shall be dismissed discontinued, or fail by reason of the alteration of the times of holding said courts. There was two terms of the court yet to elapse before the expiration of the lien of the judgment, which lapsed, no person was to be prejudiced by the alterations of the terms of the court.

The levy was made long before the expiration of the lien of the judgment. The levy vested the property in the sheriff in contemplation of law. The levy was notice to all persons.

SCOTT, judge, delivered the opinion of the court.

This was an action of ejectment brought by the plaintiff in error against the defendant in error for lands and lots in Marion county. In consequence of adverse instructions, the plaintiff submitted to a non-

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suit, and after an unsuccessful application to set it aside, sued out this writ of error.

The plaintiff claimed the premises in controversy under a sheriff's sale and deed, on a judgment dated 4th May, 1840, on which execution issued 1st July, 1842, returnable to the first Monday of September, following. The execution was levied 2d July, 1842, and the sale was made 18th August, 1843. On the 5th April, 1843, a scire facias was sued out on the above mentioned judgment for the purpose of continuing the lien of it, and a judgment of revival was entered on the 24th Nov., 1843, after a sale of the premises had taken place.

The defendant's title was a sheriff's deed, under a judgment entered 11th January, 1840, on which execution issued 19th Aug., 1842, returnable to the first Monday in September following: which was levied the day of its date, and the sale under it was made 18th August, 1843.

This controversy has arisen from the failure of the judge to hold a session of the circuit court at the return term of the writ; and the act of the general assembly, approved 24th Feb., 1843, Sess. acts, page 51, which was passed before the next regular term of the court, and which postponed its session until the first Monday in August, 1843. The 15th section of the above recited act provides that no recognizance suit or other matter shall be dismissed, discontinued, or fail by reason of the alteration of the times of holding said courts; and sales of property which would have been made at the first term, as heretofore established, shall be made at the next term to be held under this act. The act concerning courts, Rev. Code 1835, page 160, sec. 52, provides that no writ, process, plea, or proceeding whatsoever, civil or criminal, shall be deemed discontinued or abated by reason of the failure of any term or session of any court; but the same shall be continued on as if no such failure or adjournment had taken place.

The defendant contended that by virtue of these acts, his lien was preserved, and no scire facias was necessary to continue it. The plaintiff, on the other hand, maintained that the liens being executed by statute, could continue for no longer time than was allowed by law, and, having expired before the sale, the subsequent revival of the judgment by scire facias issued before the expiration of the lien, related back and gave him a priority.

The court entertaining views corresponding with those contended for by the defendant, ruled accordingly.

The obvious intent of the acts above cited, was to annihilate, as it were, the time intervening between the return day of the writs and

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that to which their execution was postponed. They were designed to make the writs as effectual to all intents and purposes, as if executed at the term to which they were made returnable. The delay was involuntary and against the consent of the party, and to hold that it worked him an injury would be the greatest injustice. The words of the statute are sufficiently comprehensive to bear this interpretation, and respect for the general assembly requires that they should be thus construed.

The lien of the judgment, under which the defendant deduces his title, was prior to that of the plaintiff, and long before the expiration of the prior lien, an execution was sued out and delivered to the sheriff, the effect of which was to continue that lien until the execution of the writ, although the time had elapsed during which the lien of a judgment continues. Rev. Code, title Execution, sec. 18. It would be an act of supererrogation to require him to revive his judgment in order to preserve his property. The only effect of it would be delay. Then the prior levy of the execution under the junior judgment, although the lien of that had not expired, did not divest the priority of the older judgment.

The judgment reviving the lien of the junior judgment was not rendered until after a sale of the premises in dispute. The party thus by his own act having disposed of the property on which he wished to impose or continue his lien, it is obvious that the judgment of revival could not relate back and give the purchaser at the sheriff's sale a right which did not exist at the time of the purchase. The party suing out the scire facias to recover his judgment was under no obligations to continue the proceedings after the sale. He might have discontinued it at his pleasure; the purchaser, therefore, could not have been influenced in his conduct by any assurance of a revival of the lien. If the sale of the property did not satisfy the judgment, the revival would have had the effect of reviving the lien on any real estate owned by the defendant in the execution, or which he had disposed of while subject to it, but surely a creditor could not thereby entitle himself to a lien on property of the defendant which had been disposed of by his own act.

The judgment of the court below is affirmed. the other judges concurring.

THE STATE to the use of JACOBS & WIFE vs. HEARST administrator of HEARST

THE STATE TO THE USE OF JACOBS AND WIFE, *vs.* HEARST ADMINISTRATOR OF HEARST.

1. When the same person is executor of an estate, and guardian of a distributee, and there is nothing to show in which capacity he holds funds, after payment of debts and settlement of the estate, he shall be presumed to hold them as guardian.

ERROR TO FRANKLIN CIRCUIT COURT.

STATEMENT OF THE CASE.

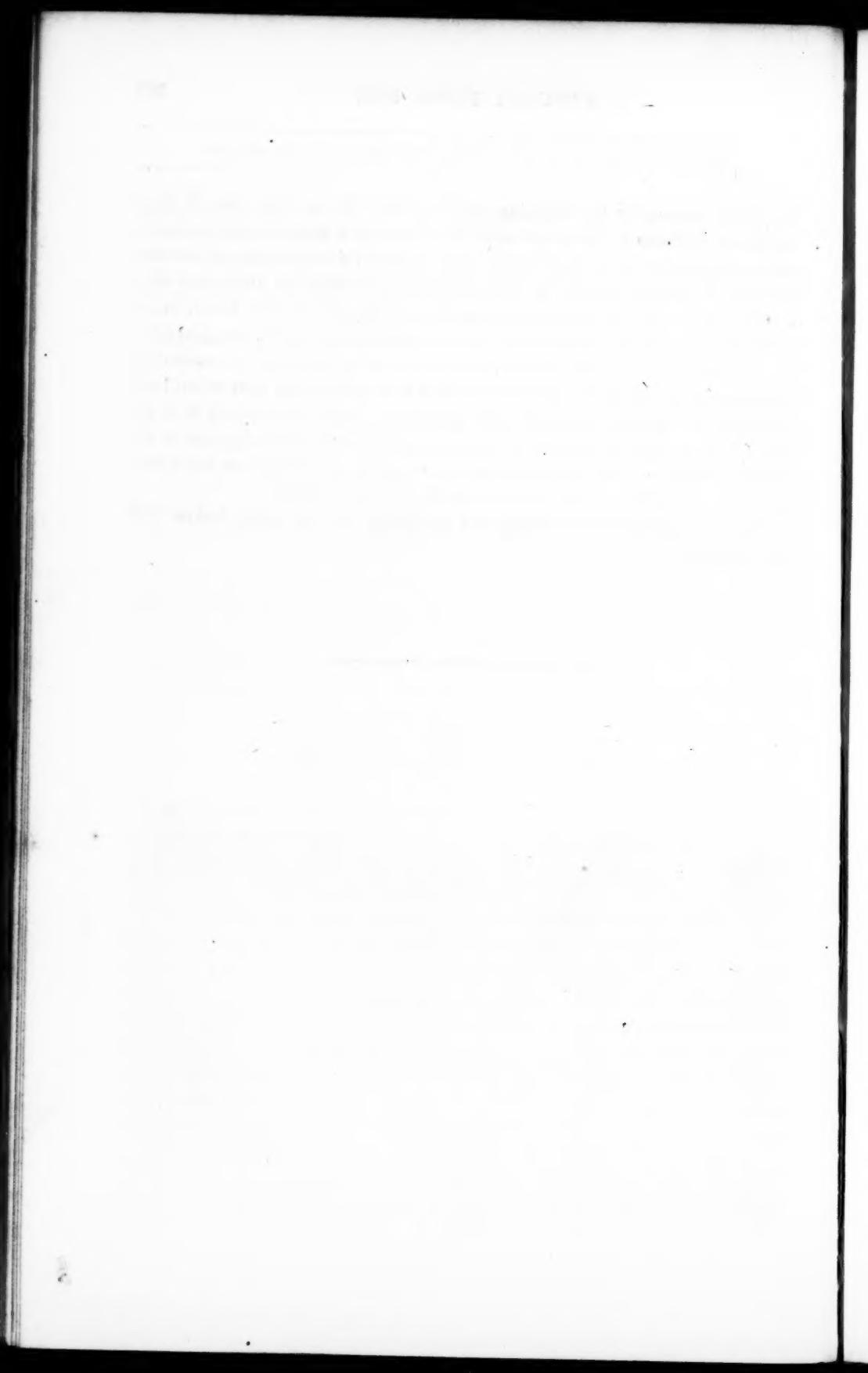
This is a suit instituted to the use of Benjamin H. Jacobs and Polly Jacobs, against George Hearst, administrator of William Hearst, who was one of the securities of Joseph Funk, executor of the last will and testament of John Horine, deceased. Polly Jacobs, formerly Polly Horine, was one of the five children of John Horine. Horine, by his last will, dated 12th December, 1824, directed all his lands lying in Franklin, Washington, and Jefferson counties, to be equally divided between his five children. He further directed the executor to sell his tract of land lying in Merrimac township, Franklin county, known as the mill tract. On the 1st April 1825, the executor sold this tract of land for the sum of \$340. On 14th July, 1830, the executor Funk received the sum of \$548 75, for three shares or dividends which John Horine deceased had and was entitled to in the proceeds of the sale of a certain tract of land lying in Washington county, sold under an order of the circuit court of said county. Suit is brought against the administrator of the security of Funk, on his executor's bond for one fifth of these two sums with interest from the period they were received. By reference to the evidence it will be seen that the executor returned the sale of the mill tract on the 1st April, 1845, to the office of the county clerk, and on the 4th February, 1833, he as executor filed an additional inventory for the sum of \$548 79, which was the amount he received from the proceeds of the sale of the land in Washington county. The plaintiffs to sustain the issue on their part, introduced the executor's bond. The will of John Horine deceased, the letters testamentary of Funk, the sale list showing the sale of the mill tract, Funk's receipt of the land sold in Washington county—additional inventory, and the parol evidence of a witness in regard to the sale of the land in Washington county, and the identification of Polly Jacobs, and her marriage with Benjamin H. Jacobs.

The defendant to sustain the issue on his part, offered and read in evidence an order of the county court of Franklin county, made on the 6th February, 1839, appointing Joseph Funk guardian of Solomon L. and Mary Ann Horine.

2d. The bond of Joseph Funk as guardian with John Pritchell and William Campbell as securities in the sum of \$1,000, dated 6th February, 1839.

3d. An order of the county court of Franklin, exempting Joseph Funk as executor from making any longer annual settlements, which order was made on the 3d August, 1830. All this evidence was excepted to by the plaintiffs.

At the close of the evidence, and at the instance of the plaintiffs, the court gave the following instruction: "If the court, sitting as a jury, find from the evidence that Joseph Funk, executor of John Horine, sold the mill tract of land for \$340, on the 1st April, 1825, and that on the 14th July, 1830, he received the sum of \$548 75 from the proceeds of land belonging to John Horine, sold in Washington county, then under the will of said Horine, the relators are entitled to recover one fifth of these two amounts against the defendant, together with interest thereon at the rate of six per cent. per annum, from the time they were respectively



SUPREME COURT,

MARCH TERM, 1849.

HOGG, ADMINISTRATOR OF GARRETT, *vs.* BRECKENRIDGE AND FERGUSON.

1. The principal in a promissory note (bearing ten per cent. interest) against whom a judgment by default has been rendered; is a competent witness for his securities, after having been released by them from payment of all costs that might accrue against them on account of their suretyship; and also from all interest beyond the rate of six per cent. upon the amount which should be adjudged against them.

ERROR TO ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

The administrators of Ferguson non-defendants in error, sued Daniel Potterfield, Enos Garrett, Enos Garrett, Jr., and Thomas B. Cluggett, on a promissory note made by them to Ferguson, the intestate, for \$1,000, dated the 1st July 1840, payable one year after date with interest at ten per cent. per annum.

The defendant, Potterfield, filed a cognovit, acknowledging the right of the plaintiff to recover. The other defendants filed several pleas, alleging that the note was made by Potterfield as principal; and that they were only securities; and that an agreement was made between Ferguson and Potterfield on the 1st July 1841, without the knowledge or consent of the other defendants, whereby in consideration that Potterfield then gave his note to Ferguson for the sum of eighty dollars, Ferguson agreed to give Potterfield further time on the principal note for one year from the said 1st July 1841.

To these pleas filed by the defendants severally replications were filed and issues were joined.

After the cognovit was filed by Potterfield, the other defendants executed to him their several releases, discharging him from all liability to either of them, for any costs to which they might be subjected in the action, and from all liability to either of them for any interest upon any money which they might be compelled to pay under any judgment in such action beyond the rate of six per cent. upon the money they might be so obliged to pay.

After these releases were delivered to Potterfield, his deposition was taken in behalf of the other defendants, and he proved the issues for the defendants.

After the deposition was taken Potterfield died, and before the trial Enos Garrett and Enos

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Garrett Jr. also died. William Hogg, as administrator of the two Garretts, entered his appearance, and the plaintiffs dismissed the action as to Potterfield.

On the trial the defendants offered to read the deposition of Potterfield, but on an objection made by the plaintiffs, the court excluded the deposition on the ground of the incompetency of Potterfield as a witness. A verdict being found for the plaintiffs, a new trial was moved for and the motion overruled.

GAMBLE & BATES, for plaintiff in error contend :

1st. That Potterfield was released from all liability to the other defendants to such extent that it was immaterial to him which party should succeed. He was not interested in the event of the controversy.

2d. That although a party to the record, he was competent to testify in favor of the other defendants. 7 Bingham 395; 1 Peters C. C. Rep. 301.

DAYTON, for defendants in error insists :

1st. That Potterfield was not a competent witness for the defendants below to establish the defence set up in the second plea.

2d. The facts set forth in Potterfield's deposition do not establish the defence relied on.

Judge BIRCH delivered the opinion of the court.

The only question properly presented by the record in this case, concerns the competency of Potterfield, a witness (and the only one) who was relied upon to prove the issue for the defendants in the court below—appellants here. Having been one of the obligors in the note sued upon, and failing to plead, there was a judgment against him by default, subsequently his cognovit to the action, and afterwards full releases by his co-obligors, as to subsequent costs and interest beyond six per cent. By his deposition subsequently taken, it was proven that he was in fact the principal, and the other defendants but securities in the note sued upon, and that these facts, which were set up in the pleas of the other defendants, were known to the plaintiffs' intestate at the time of the execution of the note. Shortly after this the suit was dismissed as to Potterfield : but it is assumed that as at the time of taking his deposition, he was liable to be included in any final judgment which might be rendered against his co-defendants, he was thereby contingently liable to the plaintiff for the costs of the suit accruing from the subsequent litigation with his co-defendants, or sureties. It is deemed unnecessary to enquire how far this may be true, as a general proposition, and when applied to suits commenced, continued and concluded against joint and several obligors, since its converse in cases

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such as this, results from the discretion and the duty devolving upon the courts to apportion and tax the costs to those parties ultimately liable, whose course of proceeding has occasioned them. The extent of Potterfield's liability to the plaintiff being thus fixed by his confession of judgment, the subsequent releases of the other defendants, rendered him a disinterested, and consequently a competent witness. The court therefore erred in excluding his deposition, and for this reason, (the other judges concurring) its judgment is reversed, and the cause remanded.

BRYAN & MILTENBERGER vs. STEAM BOAT "PRIDE OF THE WEST."

1. Under the statute of this State concerning "Boats and Vessels," no lien attaches upon a boat for money borrowed by the master to pay the debts of the boat.

APPEAL FROM ST. LOUIS CIRCUIT COURT.

GEYER for appellant.

1st. All the allegations of the complaint were fully proved at the trial. John H. Chambers was the master of the Pride of the West. The plaintiff, at his instance and request, under a contract with him, supplied, furnished and advanced money for the use of the boat, and to be used in and about the business thereof. The plaintiffs do not allege, and therefore were not bound to prove, that the money was actually applied to the use of the boat. The application of the money by the master of the boat was not in issue, and consequently the instruction given by the court erroneous. If the right of the plaintiffs depended upon the application of the money to the uses of the boat, the complaint, which must state all the particulars of the demand, should allege the application in a traversable form, and for want of such averment would be held bad on demurrer. But the defendant, instead of demurring, traversed the complaint, thereby admitting the sufficiency of the allegations, and the plaintiffs could be held in the trial of the issue to the proof of no more than they had alleged.

2d. Neither the cause of action nor the lien of the plaintiffs depends on the use to which the master puts the money. All debts contracted by the master on account of stores or supplies furnished for the use of the boat, are by statute (R. C. 1845, p. 81) liens upon the vessel, and causes of action against the owners or the vessel by name. It is the purpose for which the *stores or supplies* are furnished, and not the uses to which they are actually put, or the designs of the master, unknown to the plaintiffs. All that can be

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required, is that the contract shall be made with the master, the credit given to the vessel, and the supplies furnished for its use. The creditors acting in good faith are not, and cannot be effected by bad faith in the master. Nor can their lien or cause of action, which accrues when the contract is made and the articles delivered, be defeated by misapplication by the master afterwards.

3d. Money furnished for the uses of a vessel on the request of the master, "raises a debt contracted by the master on account of supplies furnished for the use of the boat," and is as much within the statute, certainly as "merchandise furnished to the master in order to enable him to obtain necessities for the boat by disposing of it." *The Gen'l. Brady vs. Buckley*, 6 Mo. Rep. 558. The money, therefore, so furnished, is on the same footing with stores or other supplies, attended by the same rights and obligations. The rights of a creditor for stores furnished is not affected by the sale of those stores, or the application thereof by the master to uses other than those of the boat; nor is he bound to prove that they were actually appropriated to the use of the vessel. To hold the contrary would serve no better purpose than to legalize swindling.

4th. It is not contended by the plaintiffs that if the advance had been made with the knowledge that the money was to be applied to improper uses, they could recover; on the contrary, it is admitted, that if they had been informed before or at the time of the advancee, of an intended misapplication, or assented to it afterwards, they would have no lien upon or right of action against the vessel. But when, as in this case, there is no pretence of bad faith on the part of the creditors, it is insisted that the lien attaches the instant the contract is made. Under the statute the authority of the master, in the enumerated cases, is co-extensive with that of the owners, and does not depend upon the common or maritime law. The effect of the contract is defined by statute, and cannot be made to depend upon conditions not prescribed. In a word, the authority of the master to contract debts for supplies, is plenary, and whenever he does contract such a debt, by the delivery of supplies at his request, the lien attaches by the express terms of the statute.

GAMBLE & BATES for appellee.

For the boat we say, that the demand of the plaintiffs is not within either of the classes of debt mentioned in the first section of the act concerning Boats and Vessels, and the boat is therefore not liable in this suit.

Also, section 30 of the boat law takes from the captain and other officers, the power to bind the boat, by bond or note, or any other admission of indebtedness.

And here the only semblance of a debt is money borrowed, to take up a draft drawn by the captain, without it even appearing for what account the draft was drawn.

Judge RYLAND delivered the opinion of the court.

The plaintiffs in the court below, appellants here, commenced their action in the St. Louis circuit court at the April term, 1848, against the steam boat *Pride of the West*, under the statute of this State concerning "Boats and Vessels."

The following is that part of the complaint which sets forth the demand in all its particulars: "On the twentieth day of December, eighteen hundred and forty-seven, at the city of St. Louis, in said county, the complainants at the special instance and request of, and under contract with said John H. Chambers, then master and part owner of said

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boat, and as such master, supplied, furnished, and advanced to said Chambers as such master, for the use of said boat, and to be used in or about the business thereof, money to the amount of three hundred and sixty dollars; and the said Chambers in consideration of the premises, and as such master, and on behalf of said boat and owners, then and there undertook and promised the complainants that said sum should be paid to said complainants in the same day aforesaid." Upon this complaint a warrant issued, the boat was taken into custody, and the defendant and the owners of the boat afterwards appeared to the action and file their statutory plea. Upon the trial of this issue the plaintiffs produced as a witness John H. Chambers, who stated that he was master of the steam boat Pride of the West on the 20th of December, and had been such master for some time. "On the day last named, he borrowed of the plaintiffs \$360. on account of the boat: that Mr. Bryan, one of the plaintiffs, gave him the check of the firm for the money, and that he took the check and got the money. Witness stated that he did not know Mr. Miltenberger personally: stated that he wanted the money for the use of the boat, and so appropriated it. Witness said he used the money in this instance to take up a draft he had drawn in New Orleans on the boat, payable in St. Louis and on account of the boat. Witness stated that he did not recollect that he informed Mr. Bryan to what particular use he intended to apply the money: that he had promised to return the money the same day, but failed to comply: nor had the money ever been paid to plaintiffs to his knowledge. Witness had frequently borrowed money of the plaintiffs for the use of the boat, and had, in a short time, returned the same out of the proceeds of the boat's earnings. Witness stated that the draft to which this money was applied was drawn by him in New Orleans, payable at St. Louis on the boat, and was probably due some two or three weeks before this time. Witness stated that he did not know whether any entry had been made in the books of the boat in reference to this money borrowed of the plaintiffs."

This statement contains all the material facts of this case, and upon these facts the plaintiffs prayed the following instruction:

"If money was loaned or advanced by the plaintiffs to the master of the steam boat "Pride of the West" for the use of the said boat, the application of the money by the master to the payment of an old debt, does not affect the right of the plaintiffs."

This instruction was refused, and the plaintiffs excepted.

The court then upon the application of the defendant's counsel, gave the following instructions:

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1st. If the jury believe from the testimony that the plaintiffs lent the money to Capt Chambers, of the steam boat "Pride of the West," and that the said money was borrowed by said Chambers for the purpose of paying an old draft drawn by the captain on account of the boat, and that he applied the money toward the payment of said draft, that the boat is not liable in this form for said money.

2d. The captain of the steam boat "Pride of the West" had no power generally to borrow the money on the credit of the boat.

The plaintiffs objected to the giving of these instructions, and excepted to the giving of each one of them. The jury having found a verdict for the defendants, the plaintiffs moved the court to set aside the verdict and grant them a new trial, and assigned, among others, the following reasons:

"The court erred in the instructions given to the jury."

"The court erred in refusing the instructions asked for on behalf of the plaintiffs."

The court refused to grant a new trial, and the plaintiffs appealed to this court, and now seek a reversal of the judgment below principally for the reasons above set forth in their motion for a new trial.

This case depends upon the construction which shall be given to the statute of our State concerning "Boats and Vessels." The first section of which declares that "Every boat or vessel used in navigating the waters of this State, shall be liable and subject to a lien in the following cases:"

First, "For all wages due to hands or persons employed on board such boat or vessel, for work done or services rendered on board the same, except for wages which may be due to the master or clerk thereof."

Second, "For all debts contracted by the master, owner, agent, or consignee of such boat or vessel, on account of stores or supplies furnished for the use thereof," &c., &c.

The plaintiffs demand is for so much money, cash, furnished to the master of the boat. It is not for stores or supplies, strictly speaking, but for an amount of money which the master needed and used, in order to pay a draft drawn by him in New Orleans on the boat, and payable in St. Louis. This money was furnished and used to pay a draft, which at the time was due and had been due some two or three weeks. It does not appear that any account of the transaction was kept or noticed on the books of the boat. It was simply a lending of so much money to the master of the boat, and which he applied to pay the debts of the

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boat. Was such a transaction as this in contemplation by our Legislature when this statute was enacted?

In the case of the Gen'l. Brady vs. Buckley, 6 Mo. Rep. 558, this court held that merchandize furnished to the master, in order to enable him to obtain necessaries for the boat by disposing of such merchandize, created a lien on the boat, and was within the meaning of the statute. I see not much cause to find fault with that decision. I do not feel disposed, however, to carry this doctrine of lien any further than it was carried in that case. It was said by the court in the case above cited, that money advanced to purchase supplies and stores for the boat, should be included under a liberal construction of the statute. I have no doubt of the propriety of this construction. A plaintiff may, therefore, advance money to the master or other agent of a steam boat in such a manner as to create a lien under this statute on the boat. But at the same time I hold it to be his duty, in order to come within the meaning of this statute, that whilst he is in treaty about the loan or advance of the money, he should endeavor to ascertain or to be informed of the intended purposes for which the advance or loan is sought, or of the appropriation to which the money is designed. The lender has it in his power to make his advances or loans of money a lien on the boat, and it is at his peril, should he make them under such circumstances or for such purposes as are not within the statute. He can require of the master or other agent of the boat, a declaration of the purposes for which the money is wanted, and he can expressly declare himself the causes for which he loans it; and if the loan or advance be made in order to purchase or procure *stores* or *supplies*, for the boat or vessel, a lien will attach upon such advancement of money just as much as if the debt was contracted for the stores or supplies specifically. I hold that when money has been advanced to a master or other agent of a boat for the purpose of enabling him to procure stores or supplies for his boat, that such lender is not bound to look after such master or agent, and to see how he appropriates the money thus borrowed. Whenever the contract of borrowing is complete, and the cause of such borrowing is made known at the time, and is for the purposes contemplated by the statute, then the lender has a lien, notwithstanding the master or other agent should betray the confidence or trust reposed in him, by immediately afterwards, without the consent or collusion of the lender, perverting the money acquired to any other and quite a different purpose. In order to make the lien, the money must be advanced for the purpose of procuring, obtaining, or paying for stores or supplies furnished the boat.

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If a man therefore will, like the plaintiffs in this case, advance money to a steam boat captain, without any explanation or understanding for what purpose such money is borrowed, (should it be even for the purpose of paying an old debt, and appropriated accordingly) I hold that he has no lien on the boat over which such man is captain, and that he must resort to his common law action. I, therefore, find no error in the circuit court in giving and refusing the instructions as set forth in the bill of exceptions, and in overruling the motion for a new trial. And my brother judges concurring herein, the judgment below is affirmed.

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1. A bond executed under the statutes concerning "attachments," which omits part of the conditions specified in the act, is nevertheless valid as to the conditions contained in it.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

HUDSON, for appellant.

1st. The bond on which this action was founded conforms to the provisions of the statute under which it was taken, with the exception that one or two of the conditions contained in the act have been omitted in the bond. The omissions, it will be seen by reference to the act and bond itself diminish the liability of the defendants, and by reason of the omissions the bond is more favorable to defendants. This being the case, it does not become the defendants to complain of the insufficiency of their own voluntary obligation ; they should not be permitted to take advantage of their own neglect or omissions. This court held in the case of Grant and Finney vs. Brotherton's administrator, 7 Mo. Reps. 458, that a bond given under a statute, but not following the words used in the act, is, nevertheless, valid, unless the statute prescribes a form, and declares that all bonds not taken in conformity thereto shall be void. On this point see also 10 Peters Rep. 115.

2d. A statutory bond ought to conform to the requirements of the act ; but if it does not, and there should be nothing in it illegal, it will be good as a common law bond, and a recovery may be had for a breach of its conditions. 8 Shep. 385 ; 2 Dallas 118 ; 9 Cranch 28 ; 26 Wend. 510 ; 12 Wend. 306.

3d. The obligor in a statutory bond can in no case be permitted to take advantage of an omission of a condition, when such omission is beneficial to himself. Dudley Geo. 22 ; 17 Wend. 67.

4th. Bonds taken under a statute are not void because they do not comply with all the require-

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ments of the act, unless by some provision in the act itself they are declared void. 17 Wend 67 ; 7. Mo. Rep. 358 ; 10 Peters Rep 115 ; Dudley Geo. 22 ; 1 Watts & S. 261.

5th. Although a bond may contain conditions beyond those required by the statute, yet it will be good as to those which are specified in the act. Our statute is merely directory on this subject R. C. Tit. Art. 3 Watts & Sergt. 324. The rule is that bonds are good as to such conditions as are legal, and void as to those only which are illegal. 6 Peters 335.

6th. The bond in this case is good either as a common law or statutory bond. Gilpin Rep. 153 ; 8 Mass. Rep. 153 ; 5 Ib. 314 ; 5 Peters 375.

7th. The court below erred in giving judgment for costs against the plaintiff. 11 John Rep. 141 ; Gill. & John 407 ; 2 Dev. 386.

8th. Where a party obtains an arrest of judgment for what he might have demurred to, the supreme court of Vermont refused to allow him costs. 1 Chip. 144.

CARROLL, for appellees insists :

1st. That the law prescribes a form for the bond in this case, stating expressly what the bond shall contain.

2d. The cases cited by Mr. Hudson are not like the case at bar in this, viz : 1st. That no forms were prescribed in these cases for the bond ; and they were cases where there was *more* in the bond than the law required ; or the parts omitted were *unimportant*. 2d. They were good common law bonds, and the case in 7 Mo. Rep. is a good bond at common law.

3d. The case cited by me in 1st Brockenborough p. 177, Dixon et al. vs. the United States, is exactly in point here.

The true test of the *material* parts of a bond is, "all the omitted parts generally important, or important in *themselves*," and not "are they important in the *particu'ar* case at bar."

Now the parts omitted in the bond in this case are both of intrinsic importance, and generally so in the cases brought under the attachment law.

Judge BIRCH delivered the opinion of the court.

The appellant brought his suit in the St. Louis court of Common Pleas, on a bond executed by the defendants, and filed before a justice of the peace of the county of St. Louis, upon which he obtained, and levied an attachment against the plaintiff. The suit was subsequently dismissed by the justice, and the question presented for our consideration is, whether the bond is sufficient to sustain the action commenced upon it. The bond is admitted to be right enough, except in the condition, which is in these words :

"The condition of the above obligation is such, that whereas James H. Berry, as plaintiff, is about to institute a suit before W. B. Harwood, a justice of the peace, within and for Central township, in St. Louis county, Missouri, by attachment against Harvey Cameron, as defendant, returnable on the 26th day of October, 1847, for the sum of ninety dollars. Now, if the said plaintiff shall prosecute his action without delay, and with effect, and shall pay all damages which may accrue to

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Harvey Cameron, defendant, or any garnishee, by reason of the attachment, or any process or proceeding in said suit, then this obligation to be void, &c."

The fourth section of the first article of the "act to provide for the recovery of debts by attachment," enacts that the bond shall be "conditioned that the plaintiff shall prosecute his action without delay, and with effect, refund all sums of money that may be adjudged to be refunded to the defendant, or found to have been received by the plaintiff and not justly due to him, and pay all damages that may accrue to any defendant or garnishee by reason of the attachment, or any process or proceeding in the suit, or by reason of any judgment or process thereon."

It will be perceived that the bond taken omits so much of the statutory condition as would (had it been inserted) have obliged the plaintiff in the attachment to "refund all sums of money that may be adjudged to be refunded to the defendant, or found to have been received by the plaintiff and not justly due him," and also so much as "by reason of any judgment or process thereon," the defendant had been injured, in the way of damages. The breach assigned, however, is that Berry had "failed to prosecute his suit with effect,"—one of the conditions embraced in the bond, and to which he had committed himself—and the jury having found the issue, and such damages as were proven, for the plaintiff, it would seem that the authorities ought greatly to preponderate against the obvious naturalness of such a proceeding to induce the court to arrest the entry of a proper judgment. So far from this being the case, however, the authorities of other courts to which we have referred almost entirely, concur in sustaining a previous decision of this court, (7 Mo. Rep. 458) in which it was substantially holden that where the bond merely *fell short* of the statutory enumeration in such a manner as to be more favorable to the party executing it, he could not be permitted to complain, if, after it had answered all his purposes, he was held liable to its penalties.

For as much, then, as it appears to us that the court below committed an error in sustaining the motion in arrest of judgment, its decision is reversed, and the cause remanded.

COOK vs. CLIPPARD.

COOK vs. CLIPPARD.

The purchaser of a slave from a borrower who has had five years possession, without any demand being made, and without the execution of any instrument of writing, can hold the slave against the bailor, although at the time of the purchase he has full knowledge of the circumstances of the title.

ERROR TO ST. LOUIS CIRCUIT COURT.

GAMBLE & BATES, for plaintiffs in error.

1st. The object of our statute (R. C. fraudulent conveyances sec. 5) is not to transfer the property of one man to another, arbitrarily and without right; but to prevent injury to fair purchasers and creditors, by the fraudulent covering up of property. 4 Mass. Rep. 637.

2nd. In point of law, the slave belonged to N. Cook, the plaintiff, at the time of the sale from young Cook to English. 8 Mo. Rep. 522. And English, knowing the circumstances, and the state of the title, cannot set up his own volunteer act, as a ground of charging fraud against the elder Cook, and so, of depriving him of his property. And Clippard is in the same condition.

GEYER & DAYTON, for defendant in error.

The act to prevent frauds, R. C. 1835, p. 283 sec. 5, declares that where any slave shall be pretended to have been loaned to any person, with whom, or those claiming under him, possession shall have remained for the space of five years, without demand made and pursued by due process of law on the part of the pretended lender, the same shall be taken as to all creditors and purchasers of the persons so remaining in possession to be void, and that the absolute property is with the possession, unless such loan was declared by will or deed in writing proved, or acknowledged and recorded. The case at bar is within the letter of the act, and will it avail the plaintiff to prove that the purchaser has notice of the loan. The act obviously intends to shut out all questions of notice, and place the title with the possessor. Such has been the uniform interpretation of similar acts in other States. Gay vs. Moseley 2 Munf. 543; 5 Ib. 101; 2 Bibb 244; 4 Yerger 176; 3 Ib. 39.

Judge NAPTON delivered the opinion of the court.

This was an action of detinue brought by the plaintiff to recover the possession of a slave. The plaintiff had permitted his son to take possession of the slave, as a loan, and this possession by the son had continued for more than five years, without any demand being made, and without the execution of any instrument of writing. Under these circumstances the son sold the slave to one T. B. English, who again sold her to the defendant; but both defendant and English, at the time of their respective purchases, were acquainted with the true state of the title. These facts appearing upon the trial, the court was of opinion that the title of the defendant was good, notwithstanding his

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knowledge of the fact that the slave was put into possession of the son by the father, not as a gift, but as a loan, and so instructed the jury. The defendant had a verdict and judgment.

The only question is, whether under the 5th section of our statute of fraud a purchaser is precluded from the benefit of its provisions by having notice of the loan. The statute contains no express provision in relation to notice. It declares that the absolute property shall be taken to be with the possession, so far as creditors and purchasers are concerned, where the loan has continued for more than five years, unless it has been evidenced by writing. The case is then without the letter of the law, and although no false credit is obtained where the loan is notorious, yet it is obviously the policy of the act to prevent perjury as well as fraud, and with this view to exclude all questions of notice. The object of notice could not have escaped the observation of the Legislature, as it is provided for in other sections of the same statute, and we can only infer from its omission in this section, that the loan is to be regarded as a *pretended* one, whatever it has continued beyond the period fixed and without the formalities prescribed, whether the creditor or purchaser has knowledge of the circumstances or not. The question of notice is an embarrassing one, at least, and the policy of so qualifying the statute in any case, is questionable. It would seem to be, therefore, entirely beyond the scope of judicial construction to modify the statute by its insertion in this provision, however expedient such modification might be thought.

The other judges concurring, the judgment is affirmed.

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1. If the facts of a case warrant the finding of a jury, the Supreme Court will not disturb it.
2. A person who has a right to a specific and proportionate part of the proceeds of the sale of property, may maintain *assumpsit* against any person having possession of it.

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3. If there is any evidence tending to prove a fact, its sufficiency should be determined by the jury; in such case the court ought not to instruct the jury that a party "is not entitled to recover."
4. A new trial should not be granted to a party upon the ground that he was mistaken as to the nature of his case, or as to what the witnesses would swear.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

WHITTLESEY for appellant.

The facts of this case present three questions for the decision of the court, upon the first two of which turns the error of the decision of the court below in refusing the instruction asked by defendant; and upon the third, the error in refusing to grant a new trial.

1st. It appears by the facts of the case, that by the agreement between Dickenson and the Company, that D, was to have two thirds of the pipe for his compensation for wrecking them. He was, therefore, tenant in common with the Company, and having sold the pipe to Robbins, as appears by the testimony, Robbins became entitled at least to the two thirds of Dickinson, and became tenant in common with the Company, owning two-thirds himself and the Company one-third. Upon this state of facts, we take the position, that *one tenant in common cannot sue his co-tenant at law in assumpsit*. The only case in which one tenant can sue the other, is when one has destroyed the chattel, and then the other may have an action on the case for destruction or conversion. With this exception, the only remedy one tenant in common has against the other, is an action of account or his suit in chancery. The rule that joint owners of a chattel cannot sue each other at law is well established; for example, the owners of a ship or vessel, partners in trade, and the only exception is that given above of an action on the case where the property has been destroyed. This rule is well illustrated by the rule, that all tenants in common or joint owners, must sue *jointly*. In proof of the above proposition, see 1 Chit. Pl. 91; Thompson & Price vs. Elliott, 5 Mo. Rep. 118-8; Ib. 525. Even in trover, one tenant in common cannot sue another, unless the chattel is destroyed, and a sale, as it conveys only the vendor's own right, is no destruction; 1 Taunt, Rep. 241. In Heath vs. Hubbard, 4 East. Rep. 121, the court decided that the sale of a chattel was not equivalent to its destruction, and that trover would not lie; and the same point was decided in Danforth vs. Webb, 1 Day. Rep. 301; see also 1 Tenn. Rep. 658; 8 B. & C. 257; 9 Wend. 338; Wheeler vs. Horne, Wells, 209. If one tenant in common make repairs, he cannot sue in assumpsit without demand and refusal to repair; 6 Con. Rep. 475. One tenant in common cannot sue the other for portion of rent; 8 Con. 304. One partner cannot sue the other at law until accounts are settled; 2 Conn. Rep. 425; 1 Wend. 532; 14 J. R. 318.

2nd. The plaintiff and Dickenson having been tenants in common, and Dickenson having sold to Robbins in payment of a pre-existing debt, and the company having sued in assumpsit, such suit is a ratification of the sale by Dickenson, and all the consequences of such sale are therefore ratified. Besides it appears by the evidence that Dickenson was authorized by Tracy, the agent of the company, to make a sale, it was therefore, on that supposition a valid sale. At any rate they cannot be allowed to blow hot and cold, to say that the defendant has illegally taken their property, and at the same time sue him in assumpsit for property he has bought of their co-tenant. By suing in this form of action, they have declared the sale by their co-tenant a valid sale, and must therefore look to his estate for any conversion of which he may have been guilty. See on this point, 4 Tenn. Rep. 211; 2nd Strange, 859; 1 Ark. 128; 1 T. R. 378; 7 B & C. 310; 3 B. & Adol. 580; 7 E. R. 164; 9 B. & C. 59; 5 M. & W. 83; 1 Watts & S. 108; 5 Met. Rep. 49.

3rd. The court below erred in refusing a new trial to the defendant. The affidavit of defendant showed that he was entirely surprised by the evidence offered and the case made by

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the plaintiff. It was a case which he had not expected, of which he was not informed either by the declaration or by the bill of particulars, and the affidavit shows that if a new trial were granted, he could disprove the greater part if not the whole of the plaintiff's case. He came prepared to meet one case, and found on trial one of an entirely different character. He was surprised; that surprise is a good ground for a new trial. See Hite vs. Senhart, 7 Mo. Rep. 22. For the case he had expected to meet he had made every preparation, and found on trial that all his preparations were useless; that he was not prepared for the proof offered. 1 Wm. Bl. 298; 2 Burr, 1216; 3 Taunt. Rep. 484; 3 B. & Ad. 328; 5 Ib. 9, 1 Burr, 352.

The court should also have granted a new trial because the damages were excessive. The plaintiffs, at best, were only entitled to one third of the amount, for the defendant sold the pipe, being himself the owner of the other two-thirds by purchase from Dickenson: and there was no proof at all to show that he knew any thing of the mortgage of Dickenson to the company at the time he purchased. He knew Dickenson only as the owner, as it appears from the testimony of Krum, the agent and solicitor of the company; that Dickenson brought suit for the pipe in his own name as if he was the sole owner and so recognized by the company. The damages were also excessive, as exceeding the amount claimed in the bill of particulars, in which no interest is claimed. For these reasons the appellant claims that the judgment of the court below should be reversed as erroneous.

LESLIE & LORD for appellee, submit :

1st. The verdict was right, and is supported by the law and the evidence. The case seems a naked one.

2d. The only question raised by the instruction asked in the court below, was, that the Insurance Company could not recover unless the jury found that Robbins received the money from the city on the sale of the pipe. The jury found, as a matter of fact, that Robbins did receive the money, and the finding of a jury upon a matter of fact will not be disturbed by this court. 6 Mo. Rep. 63; 8 Ib. 437; 9 Ib. 838.

3d. The affidavit upon which the plaintiff in error relies, is wholly insufficient in any point of view, either of surprise or of newly discovered evidence.

First. To entitle a party to relief on the ground of surprise, there must be merits, and the surprise must be such as care and prudence could not provide against. 2 Chitty, 194; 9 Johnson, N. Y. Rep. 77; 1 Wilson, 98; Graham on New Trials, 174.

Second. It is a new settled rule that a new trial will be granted because the party came to trial unprepared. 1 Wilson, 98; 9 John. N. Y. Rep. 77, 2 Caines, 129; 8 Cowen, 273; Graham on New Trials, 176.

Third. The court will not regard the statement of the plaintiff in error, that he was surprised by the testimony of Judge Krum and Ed. Tracy. Because no evidence was called to contradict or impeach them. Bell vs. Thompson, 2 Chitty Rep, 194.

Because, if he shows a surprise, he does not show how he was injured by it. 1st Aikens, Vt. Rep. 306.

Because he does not even pretend that if a new trial was granted to him, he could either impeach or contradict their testimony in any particular. Nor will a new trial even be granted to enable a party to impeach a witness on the ground of his interest subsequently discovered, 1 Tenn. 717; Graham on New Trials, 228.

4th. A new trial will never be granted to enable a party to produce evidence which he might have produced at the trial by using ordinary diligence. 5 Wend. 127; 1 Wilson, 98.

The plaintiff in error was fully apprised of the nature of the demand against a bill of particulars was furnished, and he was bound to have prepared his case and produced his wit-

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nesses, if he had any, 1 Strange, 690; Graham on New Trials, 196, 198, and cases there cited.

5th. It is a novel application to a court of law to apply for a new trial because the case turned out in proof different from what the defendant expected; and that if a new trial should be granted, the party expected to prove a different case from the one made. Shepard vs Citzens' In's. Company, 8 Mo. Rep. 275; Graham on New Trials, 463 and following; 4 Mo. Rep. 363; Ib. 543; 6 Ib. 600.

Judge BIRCH delivered the opinion of the court.

By the sinking of a steam boat, the Alton Marine and Fire Insurance Company became the owners, by abandonment, of a quantity of iron water pipe. Shortly afterwards, one Dickenson entered into an agreement with the company, the substance of which was, as finally concluded, that the company was to advance him two hundred dollars to enable him to proceed with the enterprise of raising the pipe, and that when it was effected, he was to have two thirds and the company one third of it; the whole, however, to be placed in the hands of E. & A. Tracy, who were to hold it as security for reimbursing to the company the money thus advanced, together with twelve per centum interest upon it, as allowed by the law of Illinois. The money being advanced, and Dickenson having succeeded in raising a portion of the pipe, it was placed in the possession of the Messrs. Tracy, with a request from both Dickenson and the company that they should sell it to the city of St. Louis. It was subsequently removed from the lot upon which it had been placed in the possession of the Tracys; whether before, at the time, or after its sale by Dickenson to the defendant, it is deemed unnecessary to enquire, as it is not pretended that either the Tracys or the company had any agency in doing it. Robbins afterwards sold the pipe to the corporate authorities of the city for the sum of ten hundred and twenty three dollars and sixty two cents, and received in the ordinary manner its official order and warrant for the money. As neither the testimony which has been preserved, nor the affidavit for a new trial, suggests any doubt respecting the proper redemption of the warrant in question, and as it is moreover proven that the treasury of the city was solvent at the time, we think the *jury*, who were instructed that "unless they believed from the evidence that Robbins received the money on the sale of the pipe, they would find for the defendant," were warranted in finding that he did receive it. The repeated decisions of this court, refusing to disturb the finding of a jury under such circumstances, need scarcely be referred to. 6 Mo. Rep. 63; 8 Ib. 437; 9 Ib. 838.

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It is objected, however, in the *argument*, but for which the point would have probably been unapparent, that the company having sued Robbins in assumpsit, and the parties being tenants in common, the action was misconceived. How this might have been if the possession and the title (whatever their nature) had not been vested by each party *in the Tracys* for the specific purpose mentioned, need not here be discussed. Nor is it necessary, as it seems to us, to examine the intermediate means whereby the defendant came into the subsequent possession. Unless he purchased the interest and the lien of the company, its rights remained unimpaired; and having found the defendant in the possession of a sum of money derived from the sale of property, out of which they were to have been paid a specific and proportionate part, we are unable to perceive the necessity of a resort to chancery, or any other proceeding in preference to the present, in order to settle with fairness and facility both the rights of the plaintiffs and the liability of the defendant. We perceive, therefore, no error in the courts refusal to instruct the jury, that "on the evidence in the case the plaintiff was not entitled to recover," a mode of presenting a legal question, of which this court but repeats its previous reprehensions for the purpose of adding that stronger reasons must exist in the future than in the past, if, a point thus raised is again entertained.

Concerning the alleged excessive damages, it is found that after adding to the sum advanced the interest which accrued upon it until the finding of the verdict of the jury, and adding to the sum of three hundred and forty one dollars and twenty cents, (which was the third part of the proceeds of the sale to the city) the interest, which in like manner accrued upon it, the aggregate sum thus produced exceeds that for which the plaintiff took his judgment. We cannot, therefore, disturb the judgment on this ground.

The only remaining reason for awarding a new trial in this case is held to consist in the alleged surprise of the defendant. As this, however, when stripped of the ingenious drapery of the affidavit, resolves itself into the every day complaint of the loosing party, either that he was mistaken as to the nature of his case, or in the testimony of the witnesses who swore upon it, we apprehend that even the courtesy which should at all times be cultivated between the bench and the bar, does not require of us a more specific or extended demonstration of the insufficiency of the reasons assigned.

Perceiving then, upon a view of the whole case, no reason to justify

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the interposition of this court, the judgment of the court of common pleas is affirmed, with costs.

Judge RYLAND. I concur in affirming the judgment below, entertaining the opinion that the point of the parties being tenants in common, was not properly raised in the inferior court, and that that court was not called on to decide that point.

GIBSON vs. ZIMMERMAN.

A conveyance to husband and wife, in fee, vests the estate in them as one person, the whole of which remains in the survivor of them.

ERROR TO ST. LOUIS CIRCUIT COURT.**GIBSON, for plaintiff in error.**

The plaintiff in error relies on the 13th section of an "act regulating conveyances. R. C. 1845 p. 221.

The spirit and meaning of this act is opposed to the construction given to it by the circuit court, and such construction is opposed to the genius of republics, and the universal practice of this government, as well as to common sense and justice. See as authority on this point, Whittlesey vs. Fuller et al. 11 Con. Rep. 337.

SPALDING & SHEPLEY, for defendant in error insist :

1st, That at common law a conveyance to husband and wife in fee, vests the estate in them as *one person*, the whole of which remains in the survivor of them.

2d. That the statutes of this State have not altered or modified the common law in this respect as to 1st point. See Preston on quantity and quality of estates, 471-2 & 307-8 (40 Law Lib.) 1st Williams on real property 567 No. 36, and 568; 5 T. R. 652. Cruiso's Digest pt. XVIII, p. 333 (492) sec. 44 et seq.; 4 Kent's Com. 358. As to 2d point, see 5 Mass. Rep. 521; 8 Ib. 274; 4 Kent's Com. 358; 16 John Rep. 110.

3d. The only case to the contrary is in 11 Cowen Rep. 337. This case expressly recognizes the common law doctrine of the tenancy by entirety in case of conveyance to husband and wife; and that the same has been adopted in some of the States, but declares that this portion of the common law has never been in use in Connecticut. This decision is therefore favorable to the position assumed by me.

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Judge RYLAND delivered the opinion of the court.

The only point in this case for our adjudication, is the effect of a conveyance of land in fee to a man and his wife during the coverture. The court below held that such a conveyance vested the entirety in each ; that on the death of the husband, the wife surviving, was seized of the whole. In other words, that the husband and wife, grantees in a deed in fee,, being in law *one person*, take the estate, not as tenants in common ; not as joint tenants ; but as tenants in entireties, each having the whole, and each unable, during the life of the other, to effect the estate to the prejudice of the other's right, and that the estate of the survivor is not a survivorship, is not a cumulation to the former estate of the survivor, but merely a continuation of the original estate vested in the quasi-corporate existence of the man and wife.

The defendant in error contends for the truth and correctness of the following positions, viz :

First. That at common law, a conveyance to husband and wife in fee, vests the estate in them as one person, the whole of which remains in the survivor of them.

Secondly. That the statutes of this State have not altered or modified the common law in this respect.

I agree with the defendant in error on both propositions—that such was the common law at the time of its adoption in this State, (then territory) and that our statutes have not altered or modified it in this particular. In the case of “Doe on demise of Lucy Freestone, against Edward Parrott and Mary his wife,” 5 T. R. 655, Lord Kenyon says : “For though a devise to A and B, who are strangers to, and have no connection with each other, creates a joint tenancy, the conveyance by one of whom severs the joint tenancy, and passes a moiety ; yet it has been settled for ages, that when the devise is to the husband and wife, they take by entireties, and not by moieties, and the husband alone cannot by his own conveyance, without joining his wife, divest the estate of the wife.”

Husband and wife are the only persons who can be tenants by entireties. This tenancy must be created or take effect during coverture ; and owes its qualities to the *unity* of the persons of husband and wife. There is no doubt of this principle existing at common law.

I will now see whether our statutes have altered or modified the common law in this particular.

The common law was adopted by our statute as early as June 1816, for

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the Territory of Missouri. Geyer's Digest 124. And the same statute adopting the common law, also declared that the doctrine of survivorship, in cases of joint tenants, shall never be allowed in this territory.

The convention that formed our State constitution, declared that all laws then in force in the Territory of Missouri, which are not repugnant to the constitution then formed, shall remain in force until they expire by their own limitation, or be altered or repealed. This took place in July, 1820. In February, 1825, the legislature, by a statute regulating conveyances, declared, "that no estate in joint tenancy in any lands, tenements or hereditaments, shall be held or claimed under any grant, devise, or conveyance whatsoever, heretofore or hereafter made, other than to executors or trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy; and every such estate, other than to executors and trustees, (unless otherwise expressly declared as aforesaid) shall be deemed to be in tenancy in common. See laws of Missouri, digested and revised in 1825, title "conveyances" sec. 3 p. 216.

In 1835 the legislature enacted, that "every interest in real estate, granted or devised to two or more persons, (other than to executors and trustees as such) shall be a tenancy in common, unless expressly declared in such grant or devise, to be in joint tenancy."

In 1845, a similar provision was incorporated into the statute concerning conveyances, and is now in force. It will be easily perceived that all of these statutes have referred to joint tenancy. It was the object to abolish that species of tenure, and no doubt exists with me, that in order to constitute a joint tenancy under our laws, specific and express terms must be used, declaring that such estate shall be held in joint tenancy, and not in tenancy in common.

Does the deed to husband and to his wife in this case make them joint tenants? In the case of Jackson ex. dem. Stevens against T. Stevens, 16 J. Rep. 115, justice Spencer says: "It appears to be well settled, that if an estate be given to a man and his wife, they take, neither as joint-tenants, nor as tenants in common, for being considered as one person in law, they cannot take by moieties, but both are seized of the entirety; the consequence of which is, that neither of them can dispose of any part without the assent of the other, but the whole goes to the survivor; the statutory provision, that no estate in joint tenancy in lands, shall be held or claimed under any grant, devise or conveyance, unless the premises therein mentioned shall expressly be declared to pass not in tenancy in common, but in joint tenancy, does not extend to this

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case, for the estate of the husband and wife is not a joint tenancy. In 1st Cowen's Rep. 95, this doctrine is again repeated. In 8 Cowen Rep. 283, the court, by Savage, chief justice, declared that "husband and wife holding lands by a conveyance to them, are not joint tenants. They are seized *per tout*, but not *per mi.* They are each owner of the whole, but not of the half. They must both join in a conveyance. They are both necessary to make *one grantor*. In 5 Mass. Rep. 523, chief justice Parsons, speaking of the statute of 1785, chap. 62, which declares that all conveyances and devises which have been or shall be made to two or more persons, shall be adjudged to be tenancies in common, unless it manifestly appears to have been the intent of the parties to the instrument, that joint tenancies were intended." Joint tenancies where the tenants are not man and wife, may be severed, and the right of survivorship be defeated at the will of either tenant, either by partition or by alienation of his property, which shall be holden by the purchaser as tenant in common. For two joint tenants generally hold by moieties, and not by entireties. As therefore a joint tenancy of this nature may be destroyed at the pleasure of either tenant, the statute very reasonably presumes that such tenancy was not intended in the conveyance, and has enacted, that unless a joint tenancy appear to be intended, the estate shall be holden in common.

But this construction of the statute cannot reasonably be extended to a conveyance to husband and wife. Here a severance of the tenancy cannot be had either at the will of the husband or the wife. They do not take by moieties but by entireties; and the alienation of the husband of a moiety, will not defeat the wife's title to that moiety, if she survive him. The statute speaks of conveyances to "two or more persons," but a conveyance to husband and wife is in legal construction a conveyance but to one person. For if an estate be conveyed expressly in joint tenancies to a husband and wife and to a stranger, the latter shall take one moiety, and the husband and wife as one person, shall take the other moiety.

And it is difficult to assign any good reason why survivorship between husband and wife is prejudicial to the commonwealth, or repugnant to the genius of Republics.

Chancellor Kent says that statutes of a similar nature (to this one of ours) have been passed in most of the States, which, however, are not applicable to conveyances to husband and wife. 4 Kent's Com. 358.

The only case that I have seen against this doctrine of husband and wife holding by entireties, is the one from Connecticut—11 Conn.

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Rep. 337 ; that admits that the common law on this subject is, and agrees with the doctrine above declared as the common law doctrine of estates per entireties ; but the court in that case decided that the doctrine of entireties has never been in use in that State, which therefore decides nothing on this point, so far as regards our State in which the common law has been adopted. I therefore declare my opinion to be, that the conveyance to husband and wife, is not, strictly speaking, an estate by joint tenancy, nor an estate in tenancy in common, but an estate in entirety ; and as such the survivor will own the whole upon the death of the other, and such being the decision of the court below, I find no error in its judgment, and my brother judges concurring in this opinion, the judgment below is affirmed.

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Where there is any evidence tending to prove a fact in issue in a cause, it is the province of the jury to determine upon its sufficiency.

ERROR FROM ST. LOUIS COURT OF COMMON PLEAS.**STATEMENT OF THE CASE.**

This was an action brought against the defendant under the 4th subdivision of sec. 1 of the revised statutes concerning Boats and Vessels. By the complaint it is alleged in substance, that the plaintiffs contracted with the captain of the steam boat St. Anthony to transport the sum of five hundred and seventy two dollars in bank notes to a point on the Ohio river, and delivered that sum enclosed in a letter to the clerk of the said boat, the letter being directed to William Pell, but that four hundred and twenty dollars of the money was never received. Plea. General issue.

On the part of the plaintiff it was proved that the sum of five hundred and seventy-two dollars was enclosed by them in a letter directed to William Pell, at Pell's landing, and put on board the steam boat St. Anthony, to be transported to and left at Pell's landing on the Ohio river ; that the same letter enclosing the money was delivered at Pell's landing, but that four hundred and twenty dollars of the amount had been abstracted from the letter before its delivery. It was also proved that the letter bore the appearance of having been broken open and resealed again.

On the part of the defendant it was proved that the letter was not delivered on her trip from St. Louis to Cincinnati, but was delivered on her return trip from Cincinnati to St. Louis.

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Darius Coder, a witness on the part of the defendant, and a hand on the boat, testified that Mr. Waugh, the clerk of the boat, told him when they arrived at Pell's landing that there was a letter to be delivered there; handed the letter to witness, and told him to look at it, "if there should be any trouble about it, to look at it and see if it was sound, that it had money in it." The witness said he looked at the sealing and saw that it was sound. The defendant also proved by the clerk of the boat, that the letter was put into the safe, and that no one had access to the safe but the captain of the boat and himself, and that the letter remained in the safe from the time the boat left St. Louis until its delivery at Pell's landing. The defendant then introduced one steam boat captain and two witnesses who had been steam boat clerks, who testified that they did not consider boats liable for the safe transportation of money if it was sent in sealed letters: that boats were in the habit of taking money free of charge for their customers.

The plaintiffs then proved by Capt. Price that he had lived in St. Louis twenty eight years, had been for a long period of time a captain of a steam boat, was well acquainted with the custom of boats in regard to the transportation of money; he had carried money frequently, and it was very customary to carry it without charge, but he always considered the boat liable for whatever money was given her to carry. This was all the testimony.

{ The court then instructed the jury as follows: "Unless the jury find from the evidence that there was a contract with the clerk of the boat for the delivery of the money in question, by which the boat was to be paid for transporting it, they will find for the defendant. Such a contract may be expressed or implied. There is no evidence in this case of any express contract, and if the jury find from the evidence that it is the usage of trade to give a receipt and charge proportionately to the amount of money committed to boats for transportation, and to notify the parties of the fact at the time of receiving the money, when it is intended to charge for it. And if the jury also find that in this case no charge was actually made for payment of any sum as freight on the package in question, the jury would not be warranted in finding an implied contract in this case." The plaintiffs excepted to the giving of this instruction, and prayed the court to give the following: "That if the jury believed from the evidence that the money in the letter referred to, charged to have been abstracted, was abstracted or purloined by the captain or clerk of the steam boat St. Anthony, they will find for the plaintiffs," which the court refused to give. The jury having retired to make up their verdict, and having been out some time, the court discharged them until 9 o'clock the next morning, and upon meeting them next morning, the court on its own motion, gave the following instruction: "There must have been a contract of affreightment to charge the boat in this case; it is essential to such contract that there should be an agreement to pay freight. In this case there is no evidence to prove such an agreement; for though according to the custom of trade, such property as that in question, under certain circumstances, becomes freight, as where a receipt is given and a charge made proportional to the risk undertaken, in other words, where an express contract is made. Yet there are no such circumstances in evidence in this case, and therefore the jury are bound to find for the defendant." To the giving of this instruction the plaintiffs excepted, and asked the court to instruct the jury as follows: "If the jury believed from the evidence a contract either expressed or implied was made by the plaintiffs with the steam boat St. Anthony, for the carrying the money mentioned in the complaint, and that such money was actually delivered to the offices of said boat to be so conveyed, and that the same was not delivered, they will find for such sum and interest, as the boat failed to deliver," which the court refused to give, and said he would give no further instructions to the jury. Afterwards, and while the counsel for the plaintiffs was out of the court room, one of the jurors come out of the jury room and went to the judge on the bench, who sent the following instruction by said juror to the jurors:

"It is the duty of the court to declare the law to the jury, and the jury to apply it to the evidence. It is within the power of the court to say to the jury, that there is no evidence

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when there is no evidence, or where there is no evidence of any legal effect in the case. In the case before the jury, the court having carefully thought over the case, has come to the conclusion that there is no evidence before the jury, the legal effect of which tends to prove a contract within the customs of trade for carrying money, and having so declared to the jury, it only remains for the jury to find a verdict in accordance with the directions of the court, they being relieved from the consideration of the evidence by the instructions."

Upon these instructions the jury found a verdict for the defendant. The plaintiffs moved for a new trial, which being overruled they appealed.

LESLIE & LORD, for plaintiffs in error.

1st. The court erred in instructing the jury that unless they found there was a contract with the clerk of the boat, by which the boat was to be paid for transporting the money, to find for the defendant. This instruction was calculated to mislead the jury. The law as laid down by the court is, that an agreement to pay freight is implied by the delivery of the goods to the carrier, and the proof in this case is, that the package in question was delivered to and accepted by the officers of the boat. 11 Mo. Rep. 226.

There needs no particular agreement for hire to render a common carrier liable, because where there is none, he may have a quantum merecit. 2 Wend. 327; 11 Mo. Rep. 226.

2d. Under the evidence in this case, it was error to instruct the jury; that if no charge was actually made for payment of any sum as freight on the package in question, they would not be warranted in finding an implied contract in this case.

If this be the law, that if no charge is actually made, the carrier is not liable, then no carrier could ever be made liable when goods are lost. Freight is not due till earned; goods are shipped and lost, and the carrier makes no charge and is not responsible. This part of the instruction was likely, also, to mislead the jury.

3d. The court erred in refusing to instruct the jury, that if the money in question was abstracted by the agent of the owner, who had it in charge, the boat was liable. 4 N. H. 304; 1st Dev. & Bat. 273; 6 Johnson 170; 1 Conn 487; 8 Sergt. & R. 533, applies to carriers by water as well as by land. 11 Pick. 41; 10 John 1; 5 Day 415; 2 Vermont 92.

4th. The court erred in instructing the jury that it was essential to a contract of affreightment that there should be an agreement to pay freight, and that bank notes could not become freight, unless a receipt was given and a charge made in proportion to the risk run.

The delivery to the boat, and the acceptance of the packet to carry, enabled the boat to charge and collect freight when the package should be delivered. It was for the boat to show that she was not to earn freight, nor to be responsible for the safe carriage of the money enclosed. 11 Mo. Rep. 226. Bank notes become freight as soon as delivered to the carrier. Story on Bail'ts. See 495.

5th. The 2d instruction asked for by the plaintiffs in this case, contained a true exposition of the law as applicable to the facts as they appear in the bill of exceptions in this case. The proposition, as contained in that instruction, was as follows: if a contract was made by the plaintiffs with the steam boat St. Anthony, either express or implied, for the carrying of the money, and the money was actually delivered to the officers of the boat, and not by the boat delivered at its destination, the plaintiffs must recover. This instruction would seem to be fully born out by the case in 11 Mo. Rep., and fully sustained in 2d Wendell 327.

6th. The court erred in giving instructions to the jury after he had announced that he would give no more, and especially in giving the instruction to a single juror, and sending it into the jury room by him, and in the absence of counsel.

7th. The court erred in instructing the jury that there was no evidence before the jury tending to prove a contract within the custom of trade, for carrying money, and the court having so de-

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clared, it only remained for the jury to find a verdict in accordance with the directions of the court, they being relieved from the consideration of the evidence by the instructions.

There was evidence proving a contract to carry the money. Delivering to, and acceptance by, the boat completed the contract. 11 Mo. Rep. 226; 2 Wend. 327.

The court said there was no evidence within in the customs of trade, of a contract to carry money, thereby undertaking to decide what the customs of trade were, as applicable to this case. Now, what the customs of trade were, was a fact for the jury to find, and the court took it from the jury. 1 Mo. Rep. 618. It was error for the court to take the case from the jury. 5 Mo. Rep. 110; 6 Ib. 73; 10 Ib. 442.

It was for the defendant to show that there was any usage of trade that relieved the boat from its responsibility. No such custom was shown.

A custom to vary or control the legal rights of parties, must be *general, uniform, notorious, and reasonable*. 1 J. Suer on Ins. 258; 5 Cranch 335; 1 Mason 127; 12 Wheat. 6 383; 1 Story 360; 8 Cranch 75; 2 Story 16.

The case of Rushforth vs. Hadfield; 7 East. 225, was where the defendants carrier claimed a lien on the goods carried, not only for the price of carrying the particular goods, but for a general balance due to them for previous carriage, and undertook to show that custom, and a particular course of trade among a particular sort of carriers, had overcome the general law that carriers had no lien for general balances. In this case the true rule was laid down, that is, that the usage must be so general as to warrant a jury in presuming that the parties who delivered the goods to be carried, knew of it, and understood that they were contracting with reference to it. "All the judges agreed that a custom of this kind, which is *quoad hoc*, to supersede the general law of the land, should be clearly proved Cowen & Hills notes to Phillips part 2nd p. 1413, 17 Wend. 305.

Judge BIRCH delivered the opinion of the court.

When this case was formerly before this court, 11 Mo. Rep. 226, the liability of a steam boat, as a common carrier, was somewhat elaborately discussed, and from the principles laid down in that decision, so far as they are involved in the questions here, we have perceived no reasons to depart. It will only be necessary, therefore, so far to restate the case, as to render intelligible, in this connection, the difference of opinion between this court and the court below.

The plaintiffs brought this suit against the steam boat St. Anthony under the fourth subdivision of the first section of the act concerning Boats and Vessels, alleging that they contracted with said boat to transport the sum of five hundred and seventy two dollars in bank notes to a point on the Ohio river, and delivered to the clerk of said boat a letter enclosing that sum, directed to Wm. Pell; four hundred and twenty dollars of which was never delivered. The parties having gone to trial upon the general issue, it was proven by the plaintiff that the letter enclosing the money, and directed as in the complaint alleged, was delivered to the clerk of the St. Anthony, on board, to be transported and left according to its direction ; that the letter was delivered, but that it

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contained but one hundred and fifty dollars, and bore appearances of having been broken open and resealed.

Various witnesses testified respecting the usages of the trade or the custom of boats in carrying such letters; and although their testimony may be regarded as inexplicit and unsatisfactory, even if taken in connection with the declaration of the clerk when on the voyage, that "they intended to have five dollars for bringing the package round," we think the instructions of the court should have left it to the *jury* to decide, from the testimony before them, whether boats were or were not in the habit of carrying such packages as freight or for hire. If they were, the liability of the boat would be unquestionable. If they were not, the case would be otherwise, except where, as held in the previous opinion in this case, *no usage* being shown, the agreement of the carrier might raise the presumption that such was his customary employment.

The contrary of these positions having been apparently assumed and acted upon by the court below, especially in the instructions which it delivered to the jury, whereby there was virtually *withdrawn* from the consideration the finding of the facts alluded to, its decision is, for that reason reversed, and the cause remanded for a new trial in conformity with this opinion.

AUSTIN vs. THE STATE.

A plea in abatement to an indictment, alleging the pendency of another indictment for the same offence, should specifically show that the indictment plead to was the one first found, and that the offensive act charged in each indictment is the same.

APPEAL FROM ST. LOUIS CRIMINAL COURT.

LESLIE & LORD, for appellant, in support of the plea in abatement, cite the following authorities :

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Commonwealth vs. Churchill, 5 Mass. Rep. 174, and cases there cited; Bacon's Abr. p. 22 to 25 title abatement; 6 Mass. Rep. 347; Beach vs. Norton, 8 Conn. Rep. 71, 75, 79.

Judge RYLAND delivered the opinion of the court.

This case was an indictment found by the grand jury of the State of Missouri, for the county of St. Louis, against the defendant, Charles Austin, under the statute for keeping a billiard table without license. The defendant appeared and filed his plea in abatement, which plea is in these words, viz: "And now the said Charles Austin, by Leslie and Lord his attorneys, comes into court here, having heard the said indictment read, saith, that at the time of the finding of this bill of indictment, to wit: at the November term of this court, in the year of our Lord one thousand eight hundred and forty-seven, and on the same day of the finding of this bill of indictment, another bill of indictment against the said Charles Austin was found and brought into this same court by the same grand jury, which found and brought into court this indictment, which said other bill of indictment was, and is, for the same identical offence or charge as is mentioned and set forth in this indictment, as by the record and proceedings thereof, remaining in said St. Louis criminal court more fully appears; and the said Charles Austin further said, that he is the same Charles G. Austin, and not other or different than the Charles Austin in the said other bill of indictment mentioned, and that the said other bill of indictment aforesaid, is still depending in the St. Louis criminal court, and this the said Charles Austin is ready to verify; wherefore he prays, judgment," &c. To this plea, the State, by the circuit attorney, files his demurrer. The plea was sworn to. The court sustained the demurrer, and required the defendant to answer to the indictment. But he elected to stand by his plea, and refused to answer or plead over. Thereupon the court ordered the plea of not guilty to be entered, and a jury to be sworn and empanelled, which was done, and the jury afterwards found the defendant guilty, and assessed the fine to four hundred dollars.

The defendant brings the case here by appeal, and the only point before this court is, whether the court below erred in sustaining the demurrer to the defendant's plea.

The defendant's counsel relies upon the case of the Commonwealth vs. Churchill 5 Mass. Rep. 174; Bacon's Abr. Title Abatement p. 22 to 25; 6 Mass. Rep. 347, and 8 Conn. Rep. 71-8-9. I have examined these cases, and I consider them not applicable to the case before the court, and without expressing any opinion on the correctness of the

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decisions made by the courts in them, I find in them nothing to operate on the present case.

Our statute concerning "practice and proceedings in criminal cases," art. 4 sec. 4, p. 867-8, Dig. 1845, declares: "If there be at any time pending against the same defendant two indictments for the same offence, or two indictments for the same matter, although charged as different offences, the indictment first found shall be deemed suspended by such second indictment, and shall be quashed." This statute is the law that must govern in this case, and I must examine the defendant's plea by this statute.

A plea under this statute should state that the indictment plead to was the one which was first found, and should state that the offence charged in the two indictments is not only the same offence, but is the same matter, the same transaction, the "*una et eadem res acta.*"

In this case suppose the defendant Austin had two, four, or some dozen billiard tables, in as many houses in this county, all publicly kept and used for playing billiards upon, without any license for any one of such tables, and he was indicted by the grand jury in as many different indictments as he had tables. The offence in each of these indictments is the same, "*co nomine*"—each is an offence for "keeping a billiard table without license," yet the subject matter is different in each. There would be as many distinct, different breaches of the law, as he had billiard tables.

I consider the defendant's plea not good and sufficient in law. It does not point out which indictment was first found, and it does not particularly enough allege the subject matter of the indictments to be the same act in both.

I therefore see no error in the court below in sustaining the demur-
rer to defendant's plea. I am consequently for affirming the judgment, and my brother judges concurring, the judgment is affirmed.

WILLIAM GLASGOW JR. vs. A. G. & W. N. SWITZER.

1. Upon the day of trial and after the cause has been once continued at a term subsequent to the issue term, it is too late to present a petition for a discovery.

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2. A person who endorses a bill of exchange to another, whether for value or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary thereof appears in evidence, as the *bona fide* holder and proprietor of such bill; and shall be entitled to recover, notwithstanding there may be on it one or more endorsements subsequent to the one to him, without producing any receipt or endorsement back from either of such endorsees, whose names he may strike out from the bill or not, as he may think proper.
3. An affidavit to prove an endorsement upon a bond, bill or note, under the act of February 16, 1847, may be taken before a justice of the peace.

ERROR TO ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

This is an action of assumpsit brought by the Switzers vs. Glasgow, on a bill of exchange for \$2050, dated at Fayette, Mo., July 18, 1846, payable at four months in St. Louis, and on the acceptance thereof by Glasgow. The bill was drawn in favor of Isaac Skinner, and appears on the back to have been endorsed by Skinner, in full, to the Switzers. Other endorsements appear on the back of the bill, viz: "Pay H. Shurlds, Esq. Cas. or order," with the names below "William C. Boon, Cas." "A. G. Switzer & Co," and crossed as here done. And it was shewn by the testimony of a credible witness, that the endorsement of Skipner was filled up after the bill was put into the hands of an attorney for suit, and that the crossing of the other endorsements was done at or about the same time.

The endorsement by Skinner was proved only by the affidavit of one Smith, which affidavit was objected to by defendant as not admissible testimony. But was admitted by the court and excepted to.

On the day on which the cause was set for trial, but before it was called for trial, the defendant exhibited his petition for discovery according to the statute, which is preserved in the record.

The court disallowed the petition on the sole ground that it was presented too late, and not for any deficiency in the body and substance thereof. And the defendant excepted thereto.

At the trial the defendant moved the four following instructions, all of which were refused and exceptions taken, to wit :

1st. If the jury believe from the testimony that A. G. Switzer & Co. endorsed said bill to Henry Shurlds, Cas., and that the same has not been re-transferred to them, the jury ought to find for the defendant.

2d. If the jury believe from the testimony that the plaintiffs and William C. Boon directed the contents to be paid to another party, the plaintiffs ought not to recover in this action, without showing to the jury how they subsequently acquired title to the bill.

3d. There is no evidence before the jury that the bill in question was ever deposited for collection in the bank of the State of Missouri.

4th. It is for the jury to determine whether or not the endorsement of A. G. Switzer & Co. on the bill is a blank or a full endorsement, and this they ought to do by inspecting the endorsements, and by such other testimony as is before them.

A verdict was then found for the plaintiffs. The defendant moved for a new trial, which motion was overruled and exceptions taken.

GAMBLE & BATES, for plaintiff in error.

1st. The court below ought not to have disallowed the bill of discovery on the ground of

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time only, and because it came too late. It is not subject to the mere discretion of the court. It is plain statutory right, and the law that gives it fixes no time for its exercise. Rev. C. Prac. at Law, Art. 4. sec. 12; 3 Mo. Rep. 453; 4 Ib. 267.

2d. The affidavit of Smith (to prove the endorsement by Skinner) was incompetent, and ought to have been rejected. Acts of 1847, p. 109.

3d. The court erred in refusing the instructions moved for, and especially the fourth. By refusing the fourth instruction the court takes upon itself to decide as matter of law what is obviously a matter of fact for the consideration of the jury: that is whether an endorsement on the bill is full or blank. 9 Mo. Rep. 710.

CROCKETT & WHITTELEY for defendants in error insist;

That the court below committed no error. The first endorsement was in blank, and was filled up for the purposes of the suit by the counsel employed by the plaintiffs, and they were at liberty to strike out any subsequent endorsement, whether blank or special. The petition for discovery was rightly refused, because it came too late; there was a witness who could have proved the same facts: no sufficient diligence was shown, and the defence set up was not available under the issue.

1 Dal. R. 193; 3 Wash. C. C. K. 404; 18 J. R. 230; Chit. B. 257, 4 Esp. R. 120; 11 Mo. Rep. 619; 8 Ib. 443; Ib. 569; 3 Wheat. 172; 3 Mo. Rep. 453; 4 Ib. 269; 7 Ib. 6; Ib 25; 8 Ib. 686; 5 Ib. 504; Story's Eq. Pl. 319; 1 John. C. R. 543; 4 Ib. 409; 7 Mo. Rep. 273; 16 Pet. Rep. 1; 3 Burr. 1664.

Judge NAPTON delivered the opinion of the court.

It appears that on the day for which this case was set for trial in the court of common pleas, the defendant presented to the court a petition for a discovery of testimony from the plaintiffs. The object of the bill of discovery was to establish that the bill sued on had been drawn by Beasley in bad faith to pay a debt due the plaintiffs; that he had no authority to draw upon the defendants except to meet liabilities incurred upon a special agreement between Beasley and the defendant for the purchase of tobacco; that the bill was accepted by James Glasgow, as the agent of defendant, under the belief that the bill was drawn to meet such liabilities for tobacco, and that the plaintiffs were aware of these facts. To excuse his delay in presenting this petition, the defendant stated that he had mistaken the court in which the action was pending; that he had suits in both the circuit court and common pleas, and supposed the suit to be depending in the former, whose sessions would not commence until some time after this application. The court of common pleas refused to grant the discovery sought, on the ground that the application came too late, and the defendant took his exception.

The statute which authorises bills of discovery in suits at law does not prescribe the time within which they shall be presented, nor does it appear that the court of common pleas in St. Louis, had any rule upon

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the subject. That there must be a period in the progress of a cause when such applications ought not, upon general principles, to be allowed, is conceded. This court held in Price vs. Connor, (3 Mo. Rep. 453) that such applications came too late after the swearing of the jury; and in Dempsey vs. Harrison & Glasgow, (4 Mo. Rep. 267) it was held that when the petition was presented upon the first day of the trial term, it was in time. In this latter case, however, it will be observed, that the petitioner had procured a continuance of the cause at a previous term on account of the absence of a witness, by whose deposition he expected to prove the facts which he then desired to establish by the answer of the party, and the deposition failing to make the desired proof, the petition for the discovery was in fact presented at the earliest time *in term* at which it could have been done. In the present case, the suit was brought on the 26th December, 1846; at the February term, 1847, pleas were filed; at the September term of the same year the pleas were withdrawn, the general issue taken and the cause was continued by consent. The case was tried in March, 1848, in the third or fourth week of the term. The facts relied upon as a defence were all known to the defendant when the suit was brought, and Beasley's position on the bill, which the petitioner supposes would prevent his introduction as a witness, had not been changed. To present a bill of discovery, under these circumstances, on the day of trial, would seem to be quite as inconsistent with the rights of the adverse party and the dispatch of business, so important to suitors, as though it had been presented after the jury were sworn. It is hardly necessary to add, that the negligence or mistake of the defendant in relation to the court in which his case was pending, constituted no claim upon the indulgence of the court.

The instructions which were refused, present the question whether the erased endorsements on the bill ought to have prevented a recovery in the present action.

The case of Davis vs. Christy (8 Mo. Rep. 569) is a decision upon our statute concerning bonds and notes. The conflict of authority in relation to the right of a holder of a negotiable note to strike out subsequent endorsements in full, is noticed in that case, and no opinion is given in relation to that question. The case of Dugan vs. U. States, (3 Wheat. 172) is in favor of the authority of the holder to strike out such endorsements, whether in blank or in full, and whether made for value or merely for collection. The language of the court in that case is quite decisive. "After an examination of the cases on this subject," says Judge Livingston, "which cannot all be reconciled, the court is of

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opinion, that if any person who endorses a bill of exchange to another, whether for value or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary thereof appear in evidence, as the bona fide holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more endorsements in full subsequent to the one to him, without producing any receipt or endorsement back from either of such endorsees, whose names he may strike out from the bill or not as he may think proper."

The reasons which influenced the construction given by this court to the assignment of bonds and notes in *Davis vs. Christy*, have certainly no application to the transfer of bills of exchange. The right of set-off, which our statute provided for in the former class of instruments, the assertion of which might have been embarrassed, if a cancellation of the assignment were permitted to destroy the title of the assignee and re-invest it in the assignor without any formal re-assignment, has no existence in negotiable paper. Nor is it easy to imagine any real inconvenience which is likely to result from the establishment of the broad position taken by the Supreme Court of the United States in *Dugan vs. U. States*. The suggestion of Judge Parker in *Nevins vs. Degrand*, (15 Mass. Rep. 436) that such a doctrine might enable a malafide holder, or one who gets possession of the bill by accident to demand payment can scarcely have any weight in determining whether, in the absence of all proof calculated to throw any suspicion of this character, the presumption may not be safely indulged that the holder came honestly by the bill. It seems to be agreed, that when the endorsement is in blank, or where it is merely for collection, the endorsee having acquired no actual interest in the bill, the endorser who subsequently gets possession of the bill may disregard the names of the endorsees to whom the transfer has been made, and no formal re-endorsement is necessary to invest him with the title. We see no objection to extending this principle to endorsements for value, provided nothing is shown tending to throw any suspicion upon the transaction.

An objection was taken at the trial to the admissibility of an affidavit taken under our statute of February 11, 1847, upon the ground that a justice of the peace in this State has no authority under that act to take the affidavit. This act provides, that affidavits taken under it, may be taken before any court of record within the U. States, &c., and this provision is supposed to exclude the power of justices of the peace within this State. The law, as it stood in 1845, (R. C. p. 762) has

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provided that justices of the peace might take affidavits and depositions "within their respective jurisdictions, in all cases where oaths and affirmations are required by law to be taken." It is obvious that the law did not design to limit the power of the magistrate to take affidavits or depositions only to such cases as could be tried before them, and we understand the act of 1847 to be merely cumulative and designed to embrace affidavits taken without the State. The power of the justice of the peace within the State to take affidavits was not taken away by that law.

Judgment affirmed.

STONE vs. THE STATE.

A licensed auctioneer cannot delegate to another his authority to sell.

APPEAL FROM ST. LOUIS CRIMINAL COURT.

HENRY N. HART, for appellant.

1st. The evidence in the case does not show that Stone ever exercised the trade and business of a public auctioneer; and therefore the first instruction given by the St. Louis criminal court on behalf of the State is error.

2d. The court erred in the second instruction given to the jury, that the crier of the goods at auction is the auctioneer. This instruction may carry out the general idea in a community—that the crier is the auctioneer, but I take it that in the legal sense such a construction would not be recognized, to wit: that the clerk of an auctioneer is the auctioneer who exercises the trade and business as such, notwithstanding he is only crying off the goods as clerk of said auctioneer, and has no interest whatever in the sales so made, further than a clerk for the men who are exercising said trade and business.

3d. The court below erred in refusing the first instruction asked for by the appellant, Stone, because if the sales were made for Austin by Scott Otis & Co., and Charles Rodeman, who were then licensed auctioneers, and Stone only cried off the goods for said auctioneers, then they were sales made by said Scott, Otis & Co., and said Charles Rodeman, and the jury ought to have acquitted Stone.

4th. The court erred in refusing the second instruction asked for by the said Stone; that instruction going to set before the jury what I contend is the law of the case under the statute. Rev. Code page 162, sec. 1 & 2, title auctioneers.

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5th: The court erred in refusing the fourth instruction asked for by and on behalf of Stone; that instruction ought to have been given, as I contend the evidence authorized the giving of the same, relying on the ground that Scott, Otis & Co., and Rodeman were licensed auctioneers, and had the right to employ any person they might think fit to cry off goods for them; and that thus the said Scott, Otis & Co., and Rodeman, were in such cases the persons who were exercising the trade and business of public auctioneers, and not their crier.

Judge BIRCH delivered the opinion of the court.

Stone was indicted at the last July term of the St. Louis criminal court, for unlawfully exercising the trade and business of a public auctioneer without license. It was proven upon his trial that he cried goods at public auction at several different times in the city and county of St. Louis, as laid in the indictment; but that during those times he was clerk of William J. Austin, at a salary, and that the sales of goods so made, (amounting to one hundred and fifty dollars worth) was at the store of the said Austin. There was something said in the testimony, to the effect that Austin had been indicted and tried for selling the same goods, but as it nowhere appears that he was convicted for it, we apprehend that no stress is laid upon that portion of the evidence, particularly as he had in license. For the defendant it was proven, that the goods sold by him at auction, consisted mostly of second hand furniture, received by Austin to be sold at his store at auction; that being still in the employ of Austin, as his clerk, he got permission from Scott, Otis & Co., and from Charles Rodeman, who were at that time auctioneers in the city and county of St. Louis, to sell the goods in *their* names, and as *their* clerk and agent, for which said sales Austin paid to said Scott, Otis & Co., and Charles Rodeman, part of the commission received from the owners of the goods, and reserved the rest for himself, the defendant having no interest in the matter.

We deem it unnecessary to notice, in detail, the points presented by the giving and refusing to give instructions to the jury; it being apparent that the case must turn upon the single point, whether an auctioneer can delegate the authority which he acquires by his license. It has been decided otherwise in Massachusetts, (19 Pick. 482) under a statute believed to be somewhat similar to ours, and the slightest reflection upon the proposition, is sufficient to demonstrate that the law would be comparatively inoperative if a contrary construction was entertained. If an auctioneer can delegate his authority to a clerk to sell goods at auction in any part of the city, there would seem no reason why he might not similarly delegate to another authority to sell elsewhere—to

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a third another locality—and so on, according to the exigencies, or prospects of profit, presented in the entire business of a large commercial city. To state such a proposition, is to refute it—and this constituting, according to our reading of the record, the only ground of complaint against the court below, we perceive no error in its refusal to grant a new trial.

Its judgment is therefore affirmed.

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OF THE ST. LOUIS PUBLIC SCHOOLS.

To entitle a party, in civil suit, to a change of venue, he must give to the adverse party reasonable notice of his application.

ERROR TO ST. LOUIS CIRCUIT COURT.

LESLIE & LORD for plaintiff in error.

1st. The court erred in not granting a change of venue.

2d. The court erred in overruling the motion to restore Evans to possession of the land, from which his tenants other than the defendant were removed.

1st. The statutes authorize and require a change of venue upon proper application being made. R. S. sec. 1 & 2 p. 1072.

The petition was sufficient, and in the form required by law.

The objection made and sustained by the court below, was, that the petition covered too much ground, as it stated that the same cause existed in St. Charles county. Rev. S. sec. 3 p. 1072, requires that a change of venue shall be to some court "where the causes complained of do not exist," &c., &c. The object of the statement was to show that the same cause did exist in another county.

The petition was not insufficient because too large. The change of venue should have been awarded.

2d. It was error to refuse to restore possession of so much land as the plaintiff in error was not in possession of when suit was brought. 5 Cowen 418; 3 Cowen 291; Tillinghast's Adams on ejectment p. 341 & notes; 1 Burrow 629; 3 Wilson 49; 3 Rand. Rep. 465; 5 Taunt. 205.

R. M. FIELD, for defendant in error.

1st. There was no error in overruling the motion for a change of venue. 1st. For no "reasonable notice," and no notice at all of the motion was given to the adverse party, and the court

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below was bound to overrule the motion. Statutes of 1845 p. 1072 sec. 3. 2d. The petition is not conformable to the statute, as it embraces St. Charles county as well as St. Louis. If the court were to sanction a petition like the present, a defendant might go farther, and put in every county in the State, and the suit must then fall to the ground for the want of a forum competent to try it.

2d. There was no error in refusing a new trial.

1st. No exception in this respect was saved.

2d. The grounds disclosed were not sufficient to call for a new trial.

Judge BIRCH delivered the opinion of the court.

This was an action of ejectment commenced against the defendant by the board of president and directors of the St. Louis public schools, to recover the possession of certain lands in the city of St. Louis, to which the defendant pleaded not guilty.

At the trial term the defendant applied for a change of venue, by petition duly verified, alleging that the plaintiff had an undue influence over the inhabitants of St. Louis county, which the court refused—the record alleging as the reason given by the judge, "that the petition was insufficient. Judgment was subsequently rendered in favor of the board, and a recovery awarded conformably with the finding of the jury, for the land described in the declaration. After issuing the habere facias possessionem, a motion was made to set it aside, and restore one Augustus H. Evans to all the lands from which his alleged tenants, other than the defendant, had been ousted under said writ. This motion was founded on two affidavits—one made by the defendant Byrne, and the other by the said Evans, in both of which it was alleged that Byrne was the tenant of Evans, and had only had possession of sixteen feet of the lot of land in question; and that other tenants of Evans' were in possession of portions of the remainder. The affidavits further alledge that there had been no proof on the trial that the defendant was in possession of more than sixteen feet of said land, and insinuated collusion between the board or their agent, and other tenants of Evans.

For refusing to change the venue, or set aside the writ of possession, the cause has been brought here. The point first raised may be decided by referring to the third section of the act providing for the change of venue in civil cases. It enacts that "if reasonable notice be given to the adverse party or his attorney, the court shall hear the case," &c., whereas the petition upon which this application was founded, was filed and decided against on the same day of the term. There was, therefore, not even a constructive notice, if, indeed, such an one could be held to be compliant with the spirit of the statute, and the record is

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silent as to any other. It is argued, however, that as the judge seems to have "heard the case," the legal presumption should attach that the court did its duty—that is to say, that notice was either waived or given beforehand. This assumption was further enforced in the argument of the counsel for the plaintiff in error, by recurring to the terms of the decision, as rendered by the judge and preserved in the record, declaring, "by its opinion and decision, the said petition to be insufficient." What considerations, if any, existed in the mind of the court for employing the terms it did in overruling the motion, it is deemed unnecessary to discuss. At the worst the judge rendered an unnecessary *reason* for a correct decision. As to the legal presumption insisted upon, and which is ordinarily true, in courtesy and in law, there stands opposed, in this case, a more unyielding and all pervading principle of jurisprudence, which is, that where a party is specifically *required* to do an act, he is held even to *strictness* in showing that he did it.

Concerning the last point, we perceive no error. The jury having found the facts as alleged in the declaration, and the judgment being in conformity with the finding, the plaintiff was entitled to his writ of possession, and to have modified it, or set it aside, upon such motions as were subsequently made, unsupported by a particle of additional testimony of any kind, would have been as it seems to us, even beyond legitimate *discretion* of the judge, and a just cause of complaint by the plaintiff below.

No substantial error, therefore, being perceived in the record before us, the judgment of the circuit court is affirmed.

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An indictment for a felony should not be docketed, nor entered upon the minutes or records of the court, unless the defendant be in custody or on bail..

APPEAL FROM ST. LOUIS CRIMINAL COURT.

Judge RYLAND delivered the opinion of the court.

THE STATE OF MISSOURI vs. AMOS L. CORSON.

This was an indictment against the defendant, Corson, for a felony, "Kidnapping," found by the grand jury of St. Louis county, and returned into court on 29th November, 1843.

On the 16th December, 1843, a capias was issued against the defendant, which was returned not executed, the defendant not being found in St. Louis county. From the record nothing further appears to have been done in this case, until the 12th September, 1848, when an alias capias was issued against the defendant, on which it appears that he was arrested, but by some means made his escape. On 29th October, 1848, a pluries capias issued against the defendant. On this writ he was arrested, and was afterwards held to bail. At the November term, 1848, of the criminal court, the defendant appeared and filed his plea in abatement to the indictment, which plea alleges, that the indictment against the defendant was found by the grand jury sometime in the year 1843, and "that the said indictment was not continued on the docket and records of said criminal court from term to term, but the said indictment, by reason of the omission and neglect to continue said indictment upon the minutes and records of said court, was wholly discontinued and abandoned, and this he is ready to verify." To this plea the State, by her circuit attorney, demurred. The criminal court overruled the demurrer and discharged the defendant. The circuit attorney prayed an appeal to this court, and that the defendant may be held to bail. The appeal was allowed, and the defendant was required to give bail.

This court is now called on to examine the judgment of the court below in overruling the demurrer to the defendant's plea in abatement.

The common law doctrine of "Discontinuances" is not considered applicable to this case; for I apprehend our statute has, so far as respects indictments for felonies, when the defendant is not in actual custody or on bail, superseded the common law in this particular. See Statute, Practice and proceedings in Criminal cases, art. 3, sec. 17, and art. 4, sec. 1, 2, and 3.

These provisions of our statute make it a misdemeanor for a grand juror, a judge, prosecuting attorney, or other officer of any court, to disclose the fact of any indictment for a felony being found, unless the defendant is in custody or on bail; and the 1st section of the 4th article above referred to, declares that such indictment shall not in such a case be open to inspection of any person, except the judge, circuit attorney and clerk, until the defendant therein shall have been arrested. The third section provides for the officers in issuing and executing the process and in the discharge of official duty.

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Under the provisions of the statute, I hold it to be the duty of the clerk not to enter on his docket, or minutes or records, the fact of the grand jury finding the bill of indictment against the defendant for a felony, unless he be in custody or on bail, nor to enter the continuances of the cause from term to term. He should keep a private memorandum book, in which all such indictments for felonies are entered, and which, together with the indictments, should not be open to the inspection of any person except the officers mentioned in the statute; and such indictment should never be docketed nor entered on the minutes nor records of the court until the defendant is in custody; otherwise the statute is nugatory. Why require the secrecy under a penalty of a misdemeanor if the officer keeping the records is required to docket and note the case and the continuances thereof from term to term? What is the object of these statutory provisions? What evil was to be guarded against? Criminals, knowing they had been indicted, often made their escape before the officers could arrest them.

It was to prevent this, and to render the administration of the criminal law more efficacious, officers were required not to disclose the finding of indictments for felonies; grand jurors were under the same requisition. Indictments were not to be open to inspection. All this was to be kept secret until the defendant should be arrested.

Now establish the doctrine contended for by the defendant's counsel in this case, and you virtually repeal the sections of the statute above referred to. The last section of the fourth article of the above statute about "continuances of the cause from term to term," should not be construed so as to render useless, if not repeal, the 1st, 2nd and 3rd sections of the same article.

The clerk may very well keep a private memorandum of all such indictments for felonies, where the defendants are not in custody or on bail, and may issue capias by the order of the court whenever he thinks the officer can apprehend the defendant.

Why should the defendant complain because his indictment does not appear entered on the record and regularly continued from term to term for five years before he was ever arrested? What injury has he sustained by this construction of our statute?

The defendant can have no cause to complain, if after having kept out of the power of the sheriff for years, until he thinks his crime and himself are both forgotten, he shall venture again to return to his former scene of action, and shall find himself the "prisoner of the

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law." "The way of the transgressor is hard," but it is one of his own choosing.

I, therefore, think the criminal court erred in overruling the demurrer in this case, and my brother judges concurring herein, the judgment below is reversed.

STATE OF MISSOURI vs. ARNOLD WITTMAR.

Upon an indictment for selling intoxicating liquors contrary to the statute concerning groceries and dram shops, it is not proper for the State to ask a witness whether ale, porter and beer, are intoxicating liquors within the meaning of the above act.

APPEAL FROM ST. LOUIS CRIMINAL COURT.

Judge RYLAND delivered the opinion of the court.

This is an appeal from the St. Louis criminal court. The defendant was indicted for unlawfully selling intoxicating liquors, to wit: "ale beer, porter, rum, gin, brandy, whiskey, and wine, in a quantity less than one quart. to wit: one glass and one gill of each of the aforesaid liquors," &c. No objection is made to the indictment. The defendant plead not guilty. The following statement is from the bill of exceptions: "This cause coming on for trial, the State introduced Washington King, and offered to prove by said King, that the defendant, within the county of St. Louis, and State of Missouri, within one year next preceding the finding of said indictment, viz., 25th Nov. 1848, did sell ale, porter and beer, and also offered then and there to prove by said King, that ale, porter and beer, were intoxicating liquors, within the meaning of the act concerning "groceries and dram shops," all which, the court at the instance of defendant then and there overruled the question, and refused to permit the State to prove the matters aforesaid."

The State excepted to this opinion and judgment of the court: the bill of exceptions was signed, and this judgment is now before this court for revision. This court is not left to construe this statute of "groceries and dram shops," so far as the words "intoxicating liquor"

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are in question, for the 28th section of the act itself, declares "that the term "intoxicating liquor," as used in this act, shall be construed to mean wine and spirituous liquors, and any composition, of which wine and spirituous liquors is a part." Such being the meaning of the term, as declared by the act itself we see no error in the court below in refusing to permit the witness, King, to prove his meaning of the term under the law.

Judgment affirmed.

JONES, ET AL. vs. MILLER.

A contracted with B to build him a boat: B employed workmen to execute the work; after the work was completed, A promised B. that if he would deliver him possession of the boat he would pay all the demands of the workmen who had been working on the boat.
Held:

That the workmen could not maintain assumpsit against A upon this promise, there being no consideration to uphold it.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

HILL for appellants.

1. The work was done at the request of Cutting, on the defendant's boat, and the promise was made to the plaintiffs in consideration of the delivery of the vessel by plaintiffs to defendant.
2. This case comes within the reason of the rule as established in *Bank vs. Benoist & Hackney*, 10 Mo. R. 524; *Robbins vs. Ayres*, Ib. 540.
3. It is a direct promise to the plaintiffs, and the consideration moved between the plaintiffs and defendant.
4. It is the simple case of a workman holding possession of his materials and work until the promise of defendant to pay, and they gave up possession when the defendant promised to pay.
5. There is no want of privity in this contract. See *Bank vs. Benoist & Hackney*, 10 Mo. R. 524, and the declaration clearly states it.

WILLIAMS for appellee.

The declaration is bad in this:

There is no good and sufficient consideration for the alleged promise.

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There is no averment that the plaintiffs were all the hands who worked upon the boat.

The defendant below, appellee here, was entitled to the possession of the boat, so far as appears in this cause. Indeed, it was already in possession of his agent, who contracted for and superintended the building of the boat.

If plaintiffs are permitted to recover, there may still be a hundred others who may sue, and thus make defendant pay more than he ever promised to pay.

This case does not fall within the decision of Ayres vs. Robbins, 10 Mo. R. 538.

Judge BIRCH delivered the opinion of the court.

This was an action of assumpsit, brought in the St. Louis court of common pleas. The declaration alleged that the plaintiffs were ship-carpenters, engaged in framing and planking a ferry boat for the defendant; that the work was done by them at the request of one Alfred Cutting, the builder of said boat; that the work so done (including materials furnished by them) amounted to three hundred dollars; that said Cutting and the plaintiffs were in the possession of said boat, then on the stocks; that the defendants, well knowing the premises, and in consideration that the plaintiffs would deliver up the possession of said boat to him, (the defendant) undertook and promised the plaintiffs to pay all the demands of the hands who had been working on said boat; and that the plaintiffs, relying on said promise, did deliver up the said boat, and afterwards requested payment, &c.

A demurrer to this declaration being sustained by the court below, the cause is brought here by appeal. Although the declaration is rather ambiguously framed, it was probably designed to bring the case as nearly as possible within the principle which was recognised in the case of Robbins vs. Ayres, 10 Mo. Rep. 538. We are unable to perceive, however, without resort to an inadmissible latitude of assumption, how it came to pass that the plaintiffs (who were in the employ of another person, with whom the defendant had contracted and to whom he was liable for the work done on his boat) acquired such a *legal* possession of the defendant's vessel, as that its alleged delivery to the owner could constitute "a valuable consideration," upon which to ground this action.

For these reasons, the decision of the court of common pleas is affirmed.

THE STATE OF MISSOURI vs. JOHN WINRIGHT.

THE STATE OF MISSOURI vs. JOHN WINRIGHT.

In framing an indictment upon the 8th section of the act concerning marriages, it is not sufficient to pursue the language of the act: the indictment should specifically state the acts committed by the defendant, to enable the court to determine whether he has violated the law.

APPEAL FROM ST. LOUIS CRIMINAL COURT.

Judge RYLAND delivered the opinion of the court.

The defendant was indicted for that, he was a justice of the peace, "did unlawfully marry, join in marriage, and solemnize the marriage of Cydney Smith, otherwise called America Smith, with and to Elijah Owens, she the said Cydney Smith, otherwise called America Smith, being then and there a female under the age of eighteen years, and under the age of legal consent, to wit, of the age of fifteen years, contrary," &c. The second count is as follows: And the grand jurors aforesaid, upon their oath aforesaid, do further present, that John Winright, late of Saint Louis, in the county of Saint Louis aforesaid, with force and arms, on the twenty-fifth day of June, in the year of our Lord one thousand eight hundred and forty-eight, at Saint Louis, in the county of Saint Louis aforesaid, he the said John Winright being then and there a justice of the peace in the fifth ward in the township of Saint Louis, within the city of Saint Louis, in the county of St. Louis aforesaid, duly elected, commissioned and qualified to perform the duties of justice of the peace as aforesaid, at the city of Saint Louis aforesaid, in the county of Saint Louis aforesaid, as such justice of the peace as aforesaid, unlawfully did marry, join in marriage, and solemnize the marriage of Cydney Smith, otherwise called America Smith, with and to Elijah Owens, she the said Cydney Smith, otherwise called America Smith, being then and there a female under the age of eighteen years and under the age of legal consent, to wit, of the age of fifteen years, no parent, nor guardian, nor any other person under whose care and government, she the said Cydney Smith, otherwise called America Smith, then and there was, being then and there present at the said marriage by the said Winright, nor giving their consent to said marriage, and the grand jurors aforesaid, upon their oath aforesaid, do further present, that neither the said minor, said Cydney Smith, otherwise called America Smith, nor any other person then and there at the said marriage, produced any certificate in writing under the hand of any parent or guardian, nor under the hand of any person under whose care and govern-

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ment the said Cydney Smith, otherwise called America Smith, then and there was, contrary to the form of the statute in [such] cases made and provided, and against the peace and dignity of the State.

D. N. HALL, Circuit Att'y."

On this indictment, the defendant was arrested, and afterwards moved to quash the indictment. 1st. Because said indictment does not rebut the regulations required by the section of the statute under which said indictment was found.

2d. Because said indictment does not allege that any person applied to the defendant to solemnize said marriage as required by the statute.

3d. Because the indictment is otherwise illegal, informal and defective. The court overruled the motion to quash. The defendant afterwards plead not guilty. The jury found a verdict of guilty, and the said defendant filed his motion to set aside the verdict and grant him a new trial—which motion he afterwards withdrew, and then filed his motion in arrest of the judgment.

The reasons assigned for the arrest of the judgment in this case, are as follows: "Because neither count of the indictment is sufficient to sustain the judgment."

"The first count charged no offence."

"The second count charged no offence."

"The judgment was for the wrong party."

The court sustained the motion and arrested the judgment. The circuit attorney prayed an appeal—it was allowed.

The only point before the court for our adjudication, is the sufficiency of the indictment.

I consider the indictment defective. The first count is so obviously defective as to need no remark. The second is faulty—it does not make the proper averments in relation to the presence and consent of the parents or guardian, or other person. It is equally faulty in the manner of stating the absence or want of the certificate in writing.

The pleader appears to have taken the statute, and without any sufficient averments of the facts necessary to make the justice of the peace guilty of any infraction thereof, broadly states "no parent, nor guardian, nor any other person under whose care and government she the said Cydney Smith, otherwise called America Smith, then and there was, being then and there present at the said marriage by the said Winright, nor giving their consent to said marriage." These averments, if such

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they can be called, are too loosely made. I therefore find no error in the judgment of the criminal court in arresting the judgment, and my brother judges agreeing with me in opinion, the judgment below is affirmed.

TWITCHELL vs. THE STEAM BOAT MISSOURI.

The statute of this State concerning boats and vessels, is limited in its provisions to contracts made within the State.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.**STATEMENT OF THE CASE.**

This was an action for money lent to the steam boat Missouri, a boat running between the port of St. Louis in this State, and that of New Orleans in the State of Louisiana. The monies were advanced on account of John W. Twitchell, the master of said boat, for the purpose of paying for stores and supplies furnished by sundry persons to the boat within six months before the bringing of this suit, and for monies paid to the hands as wages, and which also accrued within six months before the bringing of this suit. The money was lent to the boat while it was lying in the port of New Orleans.

On the trial of the cause, the plaintiff gave evidence tending to prove that the monies advanced were advanced for the express purpose of enabling the master to pay wages due to the officers and crew of said boat, and for provisions, wood, and other supplies, before then, and within six months before the institution of this suit, furnished to the boat by sundry persons; and that the money thus advanced was in fact so applied by the master, and that the same has not been refunded or repaid to the plaintiff. That at the time when said wages accrued, and said supplies were furnished, and said money advanced, the said boat was engaged in running regularly between the ports of St. Louis and New Orleans, but that the advances were made at New Orleans from time to time as the boat was there. The plaintiff resided at New Orleans. This was all the testimony in the case—whereupon the defendant moved the court to declare the law to be "that the plaintiff was not entitled to recover if the said cause of action accrued out of the State, and at the port of New Orleans in the State of Louisiana."

The court gave the instruction, and judgment for the defendant; the plaintiff filed his motion for a new trial, which was overruled, to which the plaintiff excepted, and brings the cause to this court.

WHITTLESEY, CROCKETT & BRIGGS, for appellant.

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In this case the plaintiff contends that under the laws of this State, the monies advanced to the boat by the plaintiff for the purpose of paying the wages of the hands, and for supplies and stores furnished, were a lien upon said boat, and for which suit could be instituted against the boat by name. This point is decided in steam boat Gen. Brady vs. Buckley et al., § Mo. Rep. 558. "I am inclined to think that under this provision of the law, ought to be included not only money, to purchase stores and supplies for the use of the boat," &c. The same is the rule of the maritime law, that for advances, for money to be applied to pay for repairs, stores and supplies, the master has authority to bind the vessel and owners, the rule only requiring that they shall be so applied in good faith, and that the creditor must show that they have been so applied. Keith vs. Murdock 2 Wash. C. C. Rep. 297; 12 Conn. 489; Read vs. Commercial Ins. Co.; 3 John Rep. 352.

The testimony in this case shows that the money was faithfully applied to pay for stores, supplies and wages. The plaintiff then had a lien upon the boat by the maritime law, and under our statute, unless the fact that the advances were made at the port of New Orleans out of this State, cuts off his claim and remedy in this State, under the statutes relating to boats and vessels.

The next question is the lien of the plaintiff cut out by the fact that the advances were made at the port of New Orleans. The boat was used in navigating the waters of this State, running between the ports of St. Louis and New Orleans. The plaintiff then brings himself within the express language of the statute, giving liens against all boats used in navigating the waters of this State. This case differs from the case of the steam boat Raritan vs. Pollard, 10 Mo. Rep. 583 in the fact, that there the lien accrued against the boat when she was not navigating the waters of this State; but in this case the boat was running between the ports of St. Louis and New Orleans.

The equitable principle of subrogation might also be applied to this case, for as the money had been applied to pay wages and for stores and supplies, the plaintiff might be allowed to stand in the place of those who had furnished the stores and supplies, and had rendered services on the boat.

The plaintiff therefore submits that the court below erred in the instruction given, and that its judgment should be reversed.

SPALDING & SHEPLEY, for appellee.

1st. These advances were not a continuation of the old debts for wages and supplies; and (if those were liens,) were not a continuation of those liens, but were in discharge of the former indebtedness and liens, if they were such; and therefore such advances, if they imposed a lien at all under our laws, imposed such lien, only from the date of the advance. It was a new contract.

2d. Being a new contract, and operating to discharge prior debts, and not being itself the primary debt which was a lien, and its lien, if any, commenced at the time of the advance, and such advance being on a contract in another State, on account of the boat *then there*, and by a citizen there, it could not create a lien under our statute. 10 Mo. Rep. 584; 16 Ohio Rep. 91; Ib. 178.

These three decisions are conceived to be directly on the point. The contract was made in another State—the boat and master were *then there*; the person who made the advance, and in whose favor the contract was, resided there, and of course the debt was payable, or at least was contemplated to be paid there; the place of making the contract was severed from the State of Missouri and its waters, by a thousand intervening miles of territory belonging to other jurisdictions, so far as the question is concerned, foreign to this State.

It is submitted, therefore, that the principle of the instruction given by the court below, is right, our act of Assembly has no extra-territorial effect, and in fact, in its terms does not purport to comprehend contracts made out of the State, on account of the boat while she is out of the State.

The acts of Ohio and of Missouri are substantially the same. Both make liens only against

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the boat while navigating the waters of Missouri or of Ohio, respectively. Their policy is to leave all contracts made in other jurisdictions to the ordinary remedies, or to such remedies as may be specially provided in the place where the contracts are made.

Judge RYLAND delivered the opinion of the court.

From the statement of the facts as agreed on by the counsel in this case, the main point for the adjudication of this court is, the construction of our statute concerning "boats and vessels." This is not now for the first time to be settled. The facts as stated come fully and entirely within the principles and reasoning of this court in a late decision made at Jefferson City in the case of Noble vs. steam boat St. Anthony.

The main principle settled by the court in that case, is, that our statute concerning "boats and vessels" is extra-territorial in its operation. That when the cause of action arose without the jurisdiction, and far from the limits of this State, the action could not be maintained under this statute, against the boat. Our courts are always open to afford the common law remedies. But this peculiar statutory remedy is allowed on contracts made within our own territory and our own jurisdiction.

The supreme court of the State of Ohio has decided on a statute similar to ours, in the same way. That court says that their statute has no extra-territorial operation. 16 Ohio Rep. 91; Ib. 178.

Supported, then, by the authority of the supreme court of Ohio, upon a statute very similar to ours, I concur in the views and decision heretofore made by this court, believing that decision well calculated to carry out the design and intention of the legislature.

Such being the opinion of my brother judges, the judgment of the court below is affirmed.

CITY OF ST. LOUIS vs. PETER GURNO.

A corporation is not liable to an action for damages consequential upon the grading and paving of a street, directed by the corporate authority, in pursuance of an ordinance authorized by its charter.

THE CITY OF ST. LOUIS vs. PETER GURNO.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

This was an action on the case brought by the plaintiff against the defendant to recover damages which plaintiff claims he sustained by reason of certain improvements made by the defendant in the grading, paving, &c., of certain public streets in the city of St. Louis, and which improvements caused the overflow of plaintiff's premises in times of heavy rains, and no adequate means of carrying off said water were provided by the city. Damages were laid at \$2000. To this action the defendant pleaded the statutory plea of the general issue.

On the trial, it appeared on the part of the plaintiff that he owned the property in question before the improvements were made by the city. That there was a natural gully through which the water escaped that collected on 7th and Wash streets. That in 1843 the city caused 7th and Wash streets and other streets adjacent thereto to be graded and paved, and in order to carry off the water, they cut a ditch or sewer from the corner of Seventh and Wash to an alley between 7th and 8th streets. That the water increased after the making the improvements, and the sewer made by the city was insufficient to carry off all the water. That the owners of property in that vicinity, including the plaintiff's, were desirous to have the streets improved, and took steps to have it done, and the whole difficulty arose from the insufficiency of the sewer. That the requisite sewer and such an one as would save the property in that section of the city would cost \$30,000 or \$40,000. Testimony was also given to prove the damage sustained by the plaintiff, but which it is not deemed material here to notice.

On the part of the defendant it appeared by the testimony of Henry Keyser, who was City Engineer when the improvements were made, that from St. Charles street northwardly to Wash street, lies in the lowest part of the valley that lies between two elevations on the east and west; that the water from these regions runs down on to 7th street northwardly as far as Wash street, and there turns westwardly in a gully which communicated to sink holes into which the water escapes. That when 7th was paved, the gully was closed up at its intersections with 7th street, and the water was directed to run northwardly on Wash to its intersection to an alley between 7th and 8th streets, and thence carried up on that alley until it met again the old gully. When 7th street was paved the water had washed out gullies wide and large from Morgan street north to Wash street, and that before said improvements were made most of the cellars along 7th street, on both sides northwardly from St. Charles to Wash streets were filled with water after heavy rains. That from the elevation of the intersection of 7th and Wash streets, there is a certain descent to these said holes, and that in conducting the water through the alley, in digging the ditch particular care was taken to divide that descent equally the whole length the water had to run to the sink holes, and in establishing the grade in that neighborhood, particular care was taken that not more water be drawn into 7th street than would naturally flow there. That the course of the water was diverted because of the improvement on 7th street, and that the gully went through private property. That the course of the gully, before the improvements, ran from a point about 15 feet north of the intersection of Wash street westwardly to the middle of the block where it now intersects the ditch cut by the city. That these overflows result from the large area that is drained into 7th by the ridges and the natural increase of water by the improvements. That plaintiff, at the time of the construction of the ditch, informed witness it would ruin his property. That the water has been increased by the improvements of the streets.

On the trial it was agreed that all the streets alluded to are public streets. That the grading and paving of the streets, and the construction and obstruction of the culvert or sewer near the corner of Wash and 7th streets, and the change in the original course of the gully

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or ravine, was by the city of St. Louis and authorized by it. The foregoing was all the proof in the case.

At the request of the plaintiff the court gave the following instructions to the jury: "If the jury believed from the evidence that the plaintiff was the owner of the premises in the declaration mentioned, and that the city of St. Louis, the defendant, in the improvements they made upon the streets and alleys leading to and by the premises of the plaintiff, caused mud, water and filth to flow by and along the premises of the plaintiff, and that the works so constructed to carry off said water, filth and mud, was not of sufficient capacity and size to carry off the said water, mud and filth aforesaid, and that the same was thrown upon the premises of the plaintiff, and overflowed his cellar and buildings, and that the plaintiff sustained damages to his house and lot, they will find the defendant guilty, and assess such damages as the said plaintiff has proved he has sustained."

"It was the duty of the city in making the improvements above referred to, to make improvements, construct such culvert or sewers as would be sufficient to carry off the water, carried or flowing that way, so as not to damage or injure private property." To the giving these instructions, the defendant at the time excepted.

Defendant asked the following instruction: "If the jury believe from the evidence that the improvements made by the city at and adjacent to the property of the plaintiff, were made in a skilful and proper manner by the officers of the city, they will find for the defendant, though the jury should believe that said improvements caused the injury complained of by the plaintiffs;" which instruction the court refused to give, and the defendants then and there excepted to such refusal. And thereupon the jury found the defendant guilty, and assessed the damages at \$1675 00.

The defendant then filed a motion to set aside the verdict and for a new trial, for the following reasons:

1st. Because the verdict is against law, against the evidence, and against law and evidence.

2d. The court erred in refusing instructions asked by the defendant, and in giving instructions asked for by the plaintiff.

3d. The court erred in excluding evidence offered by the defendant.

4th. The damages are excessive.

Which said motion was heard by the court, and the plaintiffs having entered a remittitur of \$675, the motion to set aside said verdict and for a new trial was overruled, to which defendant excepted and took an appeal.

BLENERHASSETT for appellant.

1st. A municipal corporation is not liable for injuries to third persons resulting from public improvements. Wilson vs. City of New York; 1 Denio Rep. 595; 4 Sergeant & Watts Rep. 514; 9 Watts 382.

2d. The court below assumes in the first instruction given for the appellee, and in that refused to be given for the appellant, that a corporation is liable in all cases where improvements made produce or cause injury and damage, whether the corporation and its officers and agents were guilty of neglect and unskillfulness or not. Such a doctrine cannot be sustained by any principle of law or reason, and is against public policy.

3d. A corporation can only be liable in damages where she constructs public works or makes public improvements on her own property, and for her own benefit, and injuries are sustained thereby by third parties, and all the authorities sustaining a recovery under such circumstances are based on principles arising from this fact. 2 Denio Rep. 434.

4th. And whose damages are sustained by the neglect or unskillfulness, &c., of such agents or officers, they are not civilly liable, but can only be proceeded against by impeachment or indictment. 1 Denio Rep. 595.

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5th. The charter of St. Louis of 1839, and the amendments thereto of 1841, do not make it compulsory on the city to make improvements, or construct works therefor, it merely empowers her to do so. The 8th clause of the first section of the 3rd article of the charter of 1839, confers this power, and it is as follows: "Sec. 1. The city counsel shall have powers within the city by ordinance" 8th clause, "To open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve and keep in repair, streets, avenues, lanes and alleys." This power being discretionary, to be exerted or withheld, according as the council may deem it necessary or proper. It is in its nature judicial, and the officer is exempt from all responsibility by action for the motives which influence him, and the manner in which such duties are performed. It is otherwise where the duty is absolute, certain and imperative. Then he acts ministerially, and he is responsible for his delinquency, and is bound to make redress to every person who suffers by his misconduct.

6. The plaintiff and appellee complains that the city did not make such a culvert or sewer as would be sufficient to carry off the water, mud, &c., that accumulated at or near plaintiff's premises, and the court instructed the jury that the city should have done so, and an omission to do this made the city liable. The reasons and principles advanced in the 5th point will apply here, and the grounds assumed come within the principles settled in the case of Wilson vs. The City of New York. 1 Denio Rep. 595.

FIELD & HALL for appellee.

1st. The city of St. Louis, as a corporation, was liable to the appellee for the construction of an insufficient sewer or culvert on Wash street, whereby the water flowing along and by the premises of the appellee was dammed up, thereby overflowing the cellar of the said appellee, and causing great injury and damage to his house.

2. The fact that the city of St. Louis is a municipal corporation, empowered by its charter and the ordinances of the city to grade and pave the streets, construct culverts, and make other improvements, does not exempt it from liability for neglecting to perform that duty in such a manner as to occasion no injury or damage to private property. In this case it clearly appears that the property of the appellee has not only been greatly diminished in value, but his house and buildings have been partly destroyed by the water thrown back upon his premises by this defective and useless work of the city.

It is evident the appellee was never disturbed in the enjoyment of his premises until the construction of this culvert, and the change of the channel where the water flowed at the time the appellee made his improvements. If it was necessary for the improvement of the city, and the saving of expense to the property holders in said corporation to grade the streets in the north west part of the city, so as to turn all the water flowing along said streets into 7th street, so as to destroy the use and value of property in that street, then there is no reason why the corporation should not be liable.

There is no force in the proposition that the grading, paving and opening streets and alleys is a discretionary power, and can be exercised in any manner, however detrimental to private property, without rendering the city liable.

In the case now before the court, the city did proceed to exercise the power of grading and paving the streets, in the declaration mentioned, and also to make and construct a sewer or culvert by the premises of the appellee, and in exercising that power they were bound to do it in such a manner as to cause as little injury to private property as possible, and to make the sewer of such size and capacity as to carry off the water flowing in that direction.

If the city undertook to make the sewers or culvert on the corner of Wash and 7th streets, for the purpose of affording a channel for the water flowing down said streets during freshets

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and rainy seasons, they were bound to make it of sufficient size and capacity for that purpose; and if they failed to do so, and private property was destroyed or damaged in consequence, the city is unquestionably liable in an action for damages.

Authorities. 19 Pick. 511; 2d Denio, 433; Baker vs. Boston, 12th Pick.; 12 Wheat. 40; 10 Ohio, 159, 4th Ib. 513; 1 Adolphus & Ellis, 526; 3rd Louisiana; 461.

Judge NAPTON delivered the opinion of the court.

The only question presented by this record, is whether the city of St. Louis is liable to an action for damages consequential upon the grading and paving of a street, directed by the city authorities in pursuance of an ordinance authorized by the city charter. The declaration in this case charged that the work was done so negligently that the water, which before the improvement of the street passed off by a natural channel, was thrown upon the plaintiff's premises, and overflowed his cellars, and otherwise greatly impaired the value of his building; but upon the trial, the court instructed the jury that the corporation was liable for the injury complained of, whether the grading of the street and the culvert constructed to carry off the water were properly made or not. So that the naked question is presented, whether the corporation is answerable in a civil action for consequential injuries of this character, however skilfully her agents may have executed the powers entrusted to them.

There is, no doubt, great difficulty in legislating so as always to secure a harmonious co-operation of private rights with public convenience, and it will prove a delusive expectation, to hope that any efficient municipal organization, either in states or cities, can be maintained, without an occasional restriction upon the enjoyment of private property. It has long since passed into a maxim, that the safety of the people is the supreme law, and as a corollary from this ancient truth, that individual convenience must yield to the public good. How far this principle may be extended, so as not to impair that enjoyment of private property which it is the duty of all just governments to protect, is a question which must be addressed to the political power in a government. The remedy for injuries sustained by acts of local municipal legislation is best obtained by a judicious limitation of the power thus entrusted to corporations, or by suitable provisions in the charter, for equitable compensation to the parties injured. It will be quite obvious, that if actions at law are sustained to adjust these questions, a wide door will be opened to speculation; litigation will be greatly increased, and the efficiency of municipal corporations very much impaired. It

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can scarcely happen that streets and alleys in a city, where there are considerable inequalities of ground, can be constructed upon any uniform plan, without producing considerable inconvenience to the owners of lots adjacent to the streets or alleys so improved. The houses built upon high points of ground, must necessarily be left at an inconvenient elevation above the level of the street, and those built upon low ground be found partially covered up. If both these classes of lot owners can maintain their actions, the municipal corporation must be embarrassed by multiplied suits and heavy damages for the construction of works, which in all probability have been undertaken at the instance of the very persons who thus ask for redress. Moreover, if the damages which result from the improvement constitute a claim against the corporation, it would be nothing more than equitable that the advantages arising therefrom in the increased value of the lots should constitute a counter claim against the owner of the lot, and should to this extent form a set-off against the supposed injury. The difficulty of adjusting such questions, in an action at law, would seem to show the impolicy of such actions, and the greater necessity for providing for their settlement in a more convenient and less expensive mode. Our impression is, that such actions as the present cannot be maintained. The distinction taken by the counsel in the argument of this case between the acts of municipal corporations in the discharge of such legislative functions as have been delegated to them by the State, and those acts which are done by mere private corporations or by municipal corporations, in the prosecution of a mere private enterprise, we take to be a sound one. Where a municipal corporation engages in an undertaking, having no reference to her municipal duties, or the interests of the public at large, but merely for her private emolument or convenience, she is then upon the same foot with any individual or private corporation, and is unquestionably answerable for her acts precisely to the same extent that an individual would be. This distinction has been recognised by the adjudged cases to which we shall hereafter advert. At present we shall only observe that the act complained of in this case was clearly one of those done in pursuance of a power vested by the charter in the city of Saint Louis for public purposes. If the city corporation be liable to such actions, the State would be equally liable for similar acts, if the Legislature, in pursuance of the constitution, had provided a mode of suing the State.

If a fort or arsenal be erected upon public ground, but so near to a private dwelling house as greatly to impair its value, no action lies against the State. 4 Term R. 794. If a public road be constructed,

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the proprietor of an adjoining house, who is injured consequentially, is without remedy, unless the injury be of such a character as comes within the constitutional restriction against taking private property for public use without compensation, or has been expressly provided for by law. A dwelling house in the country may be situated so near to a rail road constructed by the State as to render it unfit for inhabitation, yet it cannot be pretended that the owner could maintain an action against the State for damages. It would doubtless be good policy to provide in the act authorising the public work, for a compensation to individual citizens for injuries produced in this indirect mode, by the construction of the road or canal, but if no such provision is made, the loss of the citizen would be *damnum absque injuria*. No public work could be constructed, however important to the great interests of the community it might be, without being a source of endless litigation, if it be held that remote and consequential damages will lay the foundation of an action at law against the State; and a municipal corporation in discharging a portion of the legislative power entrusted to it for public purposes, will occupy the same ground as the State, and its irresponsibility in such cases depends upon the same principles.

The question we have been considering is not a new one, and we are not without authority, both in England and in several of our sister States, fully sustaining the position we have assumed.

In *Wilson vs. Mayor, &c.*, of New York, (1 Denio 597) the action was very similar to the present. The plaintiffs sued the city of New York, for so carelessly grading and paving a street, that the water was prevented from flowing off from the plaintiff's premises, and for omitting to construct a drain or sewer by which the water could be carried off. The court held that the action would not lie. They considered the corporation of the city as not responsible for damages occasioned by the construction of works of this character, which the charter of the city expressly authorized them to make, and that, although it was the duty of the city authorities to build the sewer or drain, the want of which was complained of, yet for a neglect of this duty the corporation was not responsible in a civil action.

The case of *Mayor of New York vs. Bailey*, (2 Denio 433) which was determined in the court of errors about the same time with the decision of the supreme court in *Wilson vs. Mayor, &c.*, we do not understand as at all conflicting with the principles determined in the latter case. The court of errors held, as the supreme court had held previously, that the corporation of New York was liable for the negligence

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and unskilfulness of its agents, in so constructing a dam across the Croton river, where that stream is diverted for the purpose of supplying the city with water, that a freshet swept away the dam and with it the buildings and other property of the plaintiff, situated on the stream below the dam. The liability of the city in a case of this sort, supposing that the work had been built under the superintendence of its own officers, was not questioned. It was a case where the municipal corporation engaged in a private enterprise. Although the work was undoubtedly, to some extent, a great benefit to the community at large, yet it was not properly undertaken by the city in its municipal character, but as a mere private corporation for the sole convenience and benefit of the corporate body. A corporation may be authorised to engage in works of this description; and when it does so, it is responsible to the same extent as an individual. It is no longer exercising a portion of the sovereign power which has been delegated to it for municipal purposes. The court of errors therefore held, that this corporation, though not liable for acts requiring the exercise of discretion, when those acts are for the benefit of the public, yet was liable for the acts of the agents it voluntarily employed to do business for its own private benefit, the same as any other corporation or individual.

The principal difficulty in that case arose out of the fact that the commissioners appointed to superintend the erection of the work were appointed by the legislature of New York and not by the city; and it was upon this ground mainly that the case was contested and gave rise to some difference of opinion among the members of the court. This point however has no bearing upon the subject now under consideration.

In Pennsylvania the liability of municipal corporations in cases like the present, has been considered by the courts, and their repeated adjudications are against the liability of the corporations. In Green vs. The Borough of Reading, (9 Watts 382) the action was brought by a citizen of the Borough to recover damages against the corporation for filling up the street in front of his house, whereby he lost the use of an alley, and the use and occupation of his house and lot. The court held, that the action would not lie; that the corporation, having the power by charter to pass ordinances for improving the streets, was not responsible for exercising that power, although it might produce temporary inconvenience to individuals.

The same doctrine was fully recognised by the supreme court of Pennsylvania in the case of Mayor, &c. vs. Randolph, (4 Watts & Terg 516.) This was an action against the city corporation of Philadelphia

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for causing a lot belonging to the plaintiffs to be overflowed by stopping up a water course, which had been previously drained off by some natural channel, and the court held, that the action would not lie, although the obstruction complained of in this case was produced by the city in an attempt to improve their own private property. The court, however, declared that the only question was, whether the city had authority for making the improvement, and refused to permit any enquiry into the purposes which might have been in contemplation in making such improvement. Whether the principle thus asserted would not conflict with the doctrine maintained in the case of the Mayor, &c. vs. Bailey, (2 Denio 433) is not material to be considered, as the case is only cited in support of the general position heretofore taken, and it will not weaken the force of the decision that the court carried the general principle to an unwarrantable extent in applying it to the facts of that case.

In Massachusetts the same general principle is distinctly recognised in the case of Callender vs. Marsh, (1 Pick. 418) and strongly enforced and illustrated by argument and authority. That was an action against a surveyor of the highway for digging down the streets by the plaintiff's dwelling house, and taking away the earth, so as to lay bare the foundation walls of the house, and endanger its falling; in consequence of which the plaintiff was obliged, at great expense, to build up new walls, and otherwise secure his home. After determining the question that the surveyor, under the laws of that State, had power and authority to dig down streets, about which question there was much discussion, the court held that the surveyor was not liable, unless indeed his acts were the result of a malicious and wanton exercise of power. They declare that a person cannot be liable to an action as for a tort, for an act which he is authorised by law to do. It is manifest that there is no principle upon which the surveyor of roads in that State could be exempted from responsibility for an act done in pursuance of law, which would not have applied to a municipal corporation, had the same duties been entrusted to it.

The case of Thayer vs. city of Boston, (16th Pick. Rep.) merely decided that the city corporation was liable to an action on the case for acts done by its authority, it being conceded that the acts done were illegal and wrongful.

The case of Goodloe vs. city of Cincinnati, (4 Ohio R. 500) has been supposed to be an authority in support of the doctrine that corporations in cases of consequential damage are liable to actions on the case. The opinion of the court in that case is very brief, and seems

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merely to maintain the doctrine that municipal corporations are liable to actions on the case for damages consequential upon *illegal and malicious* acts of their officers, such illegal and malicious acts having been authorised by the corporation. The question in that case came up on a demurrer to a declaration, and although the liability of municipal corporations in such cases upon general principles was largely and ably discussed by the counsel, the decision of the court was confined to very narrow grounds. "All corporations," say the court, "act by agencies, and those agencies are composed of men who may be influenced by reprehensible motives, or tempted to do acts not warranted by law. In this case the act is charged in the declaration to have been illegal and malicious. When a corporation acts illegally and maliciously, we conceive it ought to be made directly responsible. Such is the plain dictate of justice, and we see no technical rule of law that forbids us to act upon it." It will be obvious that this opinion does not touch the present case; that it has no application to the question where the corporation is admitted to have done an act which the law authorised, and where the act is done for public benefit, and in the discharge of functions purely municipal. The distinction between municipal corporations and private corporations or individuals is not adverted to; and the whole case seems to have turned upon a question, at that time much discussed in courts, whether corporations could be sued at all in actions of tort.

The case of Rhodes vs. city of Cleveland (10 Ohio Rep. 159) is still more unsatisfactory. The facts of the case are not stated, but the court maintain the responsibility of the corporation in the most unqualified terms. "If an individual" say the court, "exercising his lawful powers commit an injury, the action on the case is the familiar remedy: if a corporation, acting within the scope of its authority, should work wrong to another, the same principle of ethics demands of them, to repair it, and no reason occurs to the court, why the same remedy should not be applied to compel justice from them." Upon this reasoning the court came to the conclusion, that "justice and good morals required that a corporation should repair a consequential injury, which ensues from the exercise of its functions." Whatever may be thought of the moral obligation resting upon a municipal corporation or a State to redress injuries to individuals occasioned by an exercise of lawful and constitutional power, the question to be determined is, whether upon principles of law there is a liability in such cases to an action, and in determining the question it is manifest that the supreme court of Ohio, did not advert at all to the distinction between the liabilities

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of individuals and those of a State or municipal corporation. That such a distinction had been taken in all the English cases, seems to be conceded, and I am aware of nothing in the policy of our form of government to prevent its application here. The decisions in New York, Pennsylvania, and Massachusetts, we have seen, are in conformity to this principle, and the supreme court of the United States in *Gossley vs. Corporation of Georgetown* (6 Wheat. 593) indirectly sanction the same principle.

In the case of the governor &c. vs. Meredith and others, (4 D. & G. 794,) it was held, that where an act of parliament authorized commissioners to pave, by reason of which an individual was injured in his property, and there was no excess of jurisdiction on the part of the commissioners, neither they nor their servants were liable for such acts. The same point was determined in *Sutton vs. Clark* (6 Taun. 42) and *Harman vs. Tappenden* (1 East. 555.)

A question has been suggested, although it does not arise here, whether a wanton and malicious or negligent and unskillful exercise of powers belonging to a corporation, would not render the corporation liable. That the agents of a municipal corporation would be responsible for wanton and malicious injuries to individuals, under the pretext of discharging duties imposed on them by law, cannot be doubted, and under certain circumstances, the corporation who appoints them will be equally liable. *Harman vs. Tappenden* 1 East. 555; *Chesnut H. Co. &c. vs. Rutler* 4 Serg. & Rawle 6; 3 Wils. 561. Such acts, from their very nature, must be either the assumption of powers not granted by law, or the abuse of such as have been granted, and are therefore no longer within the protection of the general principle.

Judgment reversed.

Judge BIRCH dissenting.

Municipal corporations having been almost cotemporary with the earliest institution of political sovereignty, no sufficient reason is perceived why the rule applicable to *their* transactions should not have been moulded into cotemporary consonance with the radically opposite and progressive systems of government, which, amongst us, are held even farther to have overshadowed the advances of freedom once marked by them, than those advances were renowned and cherished for having supplanted in their early day, the assumed prerogatives of princes and the odious exactions of the feudal system. Being but

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"sovereignties within a sovereignty," the idea would seem, even at first perception too implausible to be entertained, that in this State, at least, they are either more or less than the constitution and the laws of their creation expressly *permit* them to be; and as it is the *master maxim* of the noble science we are called to administer, that "*rules cease with the reasons which gave them being,*" the mind need pause but little to scan either the conflicting definitions of English commentators, or the doctrines of English judges, when seeking to ascertain either the nature or the duties of such institutions originating here. Being, moreover, without the means of accurately comparing with our own the statutory enactments of the older Atlantic states, the deference which is usually rendered to the decisions of their courts, may be at least respectfully waived in the consideration of the case before us. It *may* be, that the legislatures of those states (like the British parliament) have felt themselves induced with an "omnipotence" so far transcending the constitutional authority of ours, as to justify them in investing the corporations of *their* creation with the exemptions asserted for them by their judicial tribunals. With us, however, the case is conceived to be not only radically different, but too plain and unambiguous to require, in the elucidation of the point in issue, any other authority than the guaranty of the constitution, to which the act incorporating the city seems to have been strictly and intelligently conformed.

By the 7th sub-division of the 13th article, it is declared that "courts of justice ought to be open to every person, and certain *remedy* afforded for *every* injury;" and, whilst it may be admitted that the language is but declaratory, it is nevertheless maintained, that, consistently with its sworn duty, the legislature could *not have authorized* an "injury" to be done, either directly or indirectly, in such a manner as to exclude the injured citizen from "certain remedy?" Nor has it done so. The law incorporating the inhabitants of the city not only does not EXEMPT, but expressly *subjects* them to be "sued," and to "defend" themselves just as an individual or "natural person;" and as it will not be pretended that for such an injury as the one complained of, one citizen would not be liable to the suit of another, it is respectfully submitted that the legal stature of this corporation, in respect to the immunity which is claimed for it, is as definitely fixed as that of the humblest or the proudest man within its limits, and that the act complained of, can have no analogy to the common law exemptions, "*damnum absque injuria.*"

If we descend, or rather ascend, from what is deemed to be the *law*

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in this case to the *reason* of it, it will be deducible from such reflection as commences at the *right point*, that the constitutional declaration which is relied upon as a guaranty here, was but the proper recognition of a great and all-embracing *political* truth which had been long dawning upon mankind, and which (when permitted) should be no less respected in their courts than in other departments of their government. It is that "upon no *just* principle do we commence the exercise of *public* power, for the *general* benefit, except at the point where experience or reflection may have demonstrated or suggested that ordinary *private* regulations are inadequately adapted to the *necessary* end—and it follows, as a consequence, that the *public* power thus invoked and moulded into action, can only be exercised for the *public* benefit, by the *public agents*, at the *PUBLIC EXPENSE.*" All beyond or below this is public usurpation, or unmitigated public aggression—and the latter, in this case, seems too glaring and fundamental to be sanctified even by a *judicial* misapplication of the maxim which has been translated from our shield, to vindicate here the *public right* to commit, and unredress, a *public wrong*!

As to the impolicy, therefore, of subjecting corporations to suits of this character, if it were even an *open* judicial question, no sufficient reason occurred why a citizen who may sue his neighbor, should be restrained from similarly suing 6 or 7,000 (incorporated) for an injury which, as was proven in this case, despoiled him in *contempt of his most earnest and admonitory protest*, of at least half the value of his property in a manner so unqualified and absolute, as to be redressed by a jury the vicinage, with all the facts before them, in a verdict of \$1,675. That suits for smaller injuries might be brought by others, is conceived to be no more a reason for denying the right in respect to a corporation than as between individuals, and unless words have strangely lost their meaning, the constitutional injunction would seem to be as inoperative in the one case as in the other—leaving to the every day discretion and prudence of the injured party, whether for damages comparatively slight, he will incur the trouble and expense of asserting his rights.

From these premises, predicated upon *our own* system of constitutional guarantees and just government, it may be readily admitted, without at all impairing the reasoning applicable here, that all the more ancient doctrines and "authorities" (?) sustain amply and even redundantly the conclusions arrived at by the senior members of this court. It is relied, however, on the other hand, that the more enlightened adjudications of later years, had been gradually adopting principles more

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congenial to the policy of our governments, and the changed condition of the age in which we live, until it may be proudly heralded, that in one of the states at least, American jurisprudence has nobly disentangled itself from the inflex labyrinths of English precedents, and the great moral and political truth, that "corporations like individuals should be liable in a suit for consequential damages, caused by a lawful act," has been enstamped with the wonted dignity of a legal principle. *Rhodes vs. the city of Cleveland*, 10 Ohio 159. In reasoning to this conclusion, the eminent chief justice who delivered the opinion of the court remarked, that he did not look so much for *precedents*, as to the following out of incontestable principles; and as the opinion in that case, and in a previous one before the same tribunal, constitute the principal official concurrence which can be referred to in support of this dissent, the language and conclusions of those judges, in lieu of the inferior originality of a less practised and more diffident judicial pen, will be interwoven, and as far as practicable adopted in conclusion here.

It did not appear to the court there, to be a sufficient reason against sustaining such a verdict as this, that in other states the remedy against corporations had not been carried so far. So long as it was kept apparent to a cool and enlightened investigation, that they did not transcend the line to which they were conducted by acknowledged *principles*, the mere fact that they might be going farther than adjudged cases had gone before, occasioned them no disquiet. It was in fact *their* duty to add the weight of *precedent* to the scale of *right*—and had they faltered, under such impressions as they seem to have entertained, no epithet would have been too severe to have applied to so great a *derelection*, as having foregone the convictions of a deliberate *judgment* to the mere numerical preponderance of previous decisions. It was admitted then, as now, that in the elder cases, whilst courts were hampered by the notion that corporate acts were to be performed under the authority of their seals, no suit like the present could be entertained. The agents, only, were regarded as responsible to persons injured. It was argued, however, with conclusive force, that since the great increase of corporations, and since so much of the business of the world is transacted through their agency, it becomes *necessary* that courts should meet their expanding *powers* by an extension of the limits of their *liability*; and that one of the peculiar benefits which our system of jurisprudence possesses, is its capacity of enlargement and adaptation to the exigencies of the varying forms of social life.

"That the rights of one should be so used as not to impair the rights

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of another, is a principle of morals which, from very remote ages has been recognized as a maxim of law. If an individual, exercising his lawful powers, commit an injury, the action on the case is the familiar remedy: If a corporation, acting within the scope of its authority, should work wrong to another, the same principle of ethics demands of them to repair it, and no reason occurs to the court why the same remedy should not be applied to compel justice from them."

Whilst the reasoning in the Ohio case, just quoted, is deemed to be irrefutable, and should consequently dispose of this case, there remains another, and perhaps to many minds, even a *plainer* view to be taken of it. In the conclusion of the constitutional sub-division already referred to, it is declared "that no private property ought to be taken or applied to public use without just compensation"—and it will not be pretended that the legislature could authorize to be done, by a cowardly indirection, what the permanent will of the State had decreed, and written down in its constitution, ought *not* to be done in any manner. In the case of Hooker vs. a canal company, the supreme court of Connecticut held (note in U. S. Digest, vol. 1 p. 401) that "an injury to land which deprived the owner of the ordinary use of it, is equivalent to a "taking" of the land; and where no compensation is provided for, or made to the owner for the injury sustained, he is entitled to recover damages for such injury." In the case now under consideration, the testimony was plain, abundant and unequivocal, that in consequence of the manner of paving the streets, and of the insufficiency of the sewer, the water and filth of that part of the city was thrown upon and into the lower story of the plaintiff's house—sometimes rising even into the rooms of the second floor—undermining, sinking and throwing down portions of the foundation, cracking the walls and (altogether) rendering the property comparatively uninhabitable and valueless. The Connecticut case, which simply "deprived the owner of the *ordinary* use of his property" could scarcely have been stronger than this; and if the judge of the court of common pleas had given to the jury an additional instruction, in the words of that decision, it is imperceivable how, upon the principles of common sense or common justice (the only true foundations of common law) it could have been objected to as erroneous. As little could it be objected to, if, in our courts, as in others, 9 Dana 114; 14 Ohio 147, 541; 5 Blackf'd 384, any *benefit* conferred upon property thus injured or "taken," was allowed to be equitably set off against the damage complained of. Even in this case, the main body of the testimony touching the measure of damages, seems to have

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had *specific* relation to the *comparative* value of the property before and after the city improvements which caused the injury ; and the instructions of the court, when applied to the evidence, could have left to the jury no improper discretion as to any other measure of assessment. That instruction was in these words :

" If the jury believe, from the evidence, that the plaintiff was the owner of the premises, in the declaration mentioned, and that the city of St. Louis (the defendant) in the improvements they made upon the streets and alleys, leading to and by the premises of the plaintiff, caused water, mud and filth to flow by and along the premises of the plaintiff, and that the works so constructed to carry off said water, filth and mud, was not of sufficient capacity and size to carry off the said water, mud and filth as aforesaid, and that the same was thrown upon the premises of the plaintiff, and overflowed his cellar and buildings, and that the plaintiff sustained damage to his house and lot, they will find the defendant guilty, and assess such damages as the said plaintiff has proven he has sustained.

That this is substantially the rule which ought to be applied in cases like the present, and that it would in no *just* sense impair the necessary efficiency of city corporations, may be restated in the recapitulation which will close this paper.

1. The public *alone*, who judge of the *necessity*, and who enjoy the convenience and reap the *benefit* of public improvements, should bear whatever damage is thereby occasioned to *pre-existing private rights*. If, therefore, this case were referable, even in a greater degree than has been supposed, to the jurisprudence of other states and countries, the deference ordinarily paid to the opinions of those who have *merely written before us*, should ever be subordinate to the conviction, that as the judicial edifice which they have been rearing is but the work of finite and discordant minds, it becomes the duty of each tribunal, in its turn, to contribute to the symmetry and perfection of its proportions, by no less firmly resisting and modifying such rules as are *clearly* erroneous, than by respecting and conforming to those which are hallowed by *reason* as well as by *time*.

2. As a judicial decision upon such a subject as this, however, should be based somewhat upon the political science of the country where it is rendered, and as with us, the constitution records that science, we should construe, if possible, as in unison with the spirit of that instrument, all subsequent emanations of the legislative will ; and, as the act of 1843 contains nothing, even by rational *implication*, to *exempt* the

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corporators from the ordinary liabilities of an individual, but on the contrary expressly renders them *liable* just as "a natural person" would have been, the verdict of the jury who simply found the fact, and assessed the damages, under proper instructions from the court, should not be disturbed for any reasons upon the face of the record here.

These considerations, which might be greatly amplified and extended, have restrained a reluctant disconcrecence both with the ethics and the law, which, having driven a citizen from his home now drives him from the halls of justice with the abasing humiliation confirmed to him in the shape of a judicial decision, that if the authorities of his great and growing city, to the treasury of which he renders his yearly proportion, see fit to employ the aggregate taxes thus accumulated, to empty upon *him*, instead of carry to the river, the wash and offal of all the neighboring streets and alleys, the saving to the city renders it an "injury" of that class, for which the policy of the law allows him no "remedy!"

Such a citizen (it is as respectfully as earnestly submitted) is but tantalized when told, that "under certain circumstances" if he can establish that the corporation acted "*maliciously*," he can make them pay. *That* question was not in issue, and perhaps will never be, under the advice of any lawyer, who appreciates intelligently the difficulty of technically sustaining such an allegation. So long, therefore, as the city is subject alone to a rule like that, its corporation will be comparatively omnipotent, its inhabitants, by turns, oppressors and vassals.

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1. If A for a valuable consideration makes a promise to B for the benefit of C, C may maintain an action in his own name on such promise.
2. In order to constitute a former judgment a bar to another suit, it should appear that both suits are for the same cause of action and between the same parties.

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LESLIE & LORD, for appellant.

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1st. The court below erred in deciding that the former suit between Doughty, one of the plaintiffs below, and Corl, for the same identical demand, for which this suit was brought, was not a bar to this action.

2d. The court, upon the facts in this case, erred in deciding that Riggs, Levering & Dougherty, could maintain an action against Corl, on the agreement, as stated in the agreed case, as made between Scoville & Johnson & Corl.

It is a rule of law, that a man shall not be twice vexed for one and the same cause.

Broom's legal maxims 135.—“For you shall not bring the same cause of action twice to a final determination.”

Kitchen & others vs. Campbell 3 Wil. 308—“what is meant by the same cause of action is, when the same evidence will support both actions.”

“When a party has once litigated, or what is the same thing, had an opportunity of litigating, he cannot bring a second action.” 12 Vermont 117; 1 McLean 450; 2 John 210; 16 Johnson, 136.

The judgment for the defendant in the court below, in the suit with Doughty, was conclusive. Suppose the judgment had been for Doughty, could Riggs, Levering & Doughty, have sued again?

They cannot say that they were strangers to the suit.

There is no privity of contract between the parties. Corl's agreement with Johnson & Scoville, and they alone can enforce it.

F. A. DICK, for appellees.

1st. One suit in order to be a bar to another, must be between the same parties; and these two suits are not between the same parties. 1 Greenleaf's Ev. 672 sec. 522; 1 Phil. Ev. 230 & note to same in 2nd Phil. Ev. 572 (note 438.) Baring et al. vs. Fanning, 1 Paine C. C. Rep. 549; Hutchins vs. Fitch, 4 J. R. 222; Boardman vs. Reed's Lessee, 6 Peters, 328; 1 Phil. Ev. 222; Edition of 1820.

2d. The same cause of action,—and there is not the same cause of action in these two suits. Kraft's admrs. vs. Hurtz & Jungk, 11 Mo. Rep. 109. New England Bank vs. Lewis, 8 Pick. 113; 3 Phil. Ev. 835 (n. 589.)

3rd. The former trial should be upon the merits, 1 Greenleaf's Ev. 677 sec. 530; 5 J. R. 442; 3 Phil. Ev. 818 n. 571; to p. 327; 1 Phil. Ev. 327.—Hughes vs. Blake, 1 Mason 515, 519.

Judge BIRCH delivered the opinion of the court.

This was an agreed case,—the facts having been set down in writing, for the judgment of the court of Common Pleas, in these words:

“It is agreed by and between the parties to this suit, as follows, to wit, that Scoville and Johnson were keepers of a dram shop or coffee house in the city of St. Louis, contracted a debt with the plaintiffs for liquors sold to them amounting to the sum of seventy dollars, that after said debt was contracted the defendant purchased out the interest of said Scoville & Johnson in said coffee house, and agreed with them to pay certain debts, owing by them, to sundry persons, whose names were set down on the back, or attached to the bill of sale so made by the said

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Scoville & Johnson to the defendant, and that the debt due to the plaintiffs, was of this number so set down. That heretofore a suit was brought by James W. Doughty, one of the plaintiffs in his own name, against Corl the above defendant for the same identical demand or goods sold, that this suit is brought to recover. That a trial in such case so commenced by Doughty vs. Corl was had in this court at the last term thereof, which resulted upon the case being submitted to the jury, in a verdict for the defendant, Corl. After the verdict and judgment in the said case between Doughty & Corl, the plaintiffs commenced this suit, and the question to be submitted to this court upon the foregoing statement of facts, is, whether the verdict and judgment in the case of Doughty vs. Corl is a bar to the present action."

Judgment having been rendered for the plaintiff's below, the cause is brought here by appeal, and presents for our consideration, two questions,—one raised by the agreement, and the other presented in the motion for a new trial. The latter is, that as the promise was not made directly to the plaintiffs, upon a consideration moving from them, they had no cause of action. In reference to this, it is but necessary to re-apply the principle which was recognized by this court in the case of Robbins vs. Ayres, to which we have referred in previous decisions rendered at the present term. It will scarce be pretended that the purchase of interest in a coffee house did not constitute "a valuable consideration"—and, in such a case, there was no necessity that it should be "moving" from a creditor of a vendor, who was thereby to be paid.

As to the other point, whilst admitting the general force of the reasoning employed by the counsel for the defendant, in support of the maxim that "a man shall not be twice vexed for one and the same cause," we think it inapplicable in a case like the present. Doughty *had* no "cause" or right of action, in his *own name*, against the defendant it was, in fact, because the same parties were *not* plaintiffs in the first suit, that one of them had to pay the costs of it, and join in the present one. In the legal conclusion, therefore, that the present plaintiffs ought not to be barred in this suit, by reason of the miscarriage of the other, we are not unsupported by authority,—the case of Chapman vs. Chapman, 1 Mum. 398, referred to, and reiterated in Barring vs. Fanning, 1 Paine 556, being so nearly analogous to the present one, that we need but copy and adopt the language of the judge who delivered the latter opinion: "It was there laid down that a record in one suit cannot be read as evidence in another, on the ground that the defendant and one of the plaintiffs in the latter suit, were parties to the former, and that the same

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point was in controversy in both; another plaintiff, and the person under whom, both the said plaintiffs jointly claimed, not having been parties to such former suit."

The record in this case denoting no other ground or presumption of privity, we concur in the opinions of the court of common pleas, and its judgment is accordingly affirmed.

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If A, for a valuable consideration, makes a promise to B for the benefit of C, in such case 1st. C may maintain an action in his own name upon the promise, or 2d. B may sue upon it for the use and benefit of C.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

This was an action of assumpsit. The first count states a balance due by the defendant to the plaintiff, on the sale of the steam boat Tioga. The second count states that the defendant agreed that in consideration the plaintiff would sell the said boat to the defendant, the defendant agreed that he would pay all claims and demands for which said boat had been sued in St. Louis county, and for which the plaintiff, as owner, was then and there liable, and that plaintiff did sell and deliver said boat to the defendant; and that at the time of said sale the plaintiff was indebted to John Cotton in the sum of \$250; and that Cotton, before that time, had instituted suit against said boat for said demand, which was pending in the St. Louis circuit court, and that defendant undertook to pay the plaintiff the amount of the demand of the said Cotton, and that the amount so due Cotton, was part and parcel of the sum agreed to be paid by the defendant to the plaintiff; and that defendant was then and there credited with said amount, as cash; breach—that the defendant had not paid the plaintiff or Cotton. The common counts were added. On the trial of the case the defendant proved that the steam boat Tioga was indebted in the sum of \$111 60, to the said Cotton for wages as pilot on said boat. The plaintiff then gave in evidence, the record and proceedings in the case of John Cotton vs. steam boat Tioga, in the St. Louis circuit court for the debt due by said boat to said Cotton, which said suit was dismissed by the court because the affidavit was insufficient. The plaintiff then gave evidence tending to prove that there were liens on said boat; that the boat was attached, and offered for sale, but that she was not sold, because the defendant took the boat and agreed to pay the debts of the boats, and all the claims against her. This was in the fall of 1845, and the boat was then delivered to the defendants.

The defendant then produced an instrument between one Mallory and McLaughlin, dated Septem-

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ber 13th 1845, stating that as McLaughlin had made to said Mallory a bill of sale of said boat, that Mallory would re-convey to the plaintiff said boat, if the plaintiff paid the claims and demands against said boat.

On the 27th October 1845, McLaughlin assigned this instrument to one McLean, and on the 27th Nov. 1845, McLean transferred the same to Belt. This instrument and assignments were all under seal.

On the 30th October 1845, the sheriff sold said boat to defendant, in virtue of an order of sale under a judgment in favor of J. & W. Finney vs. said boat, and executed a bill of sale.

H. B. Belt was then called by defendant, who testified that he conducted the negotiation for the said boat, on the part of the defendant, that the purchase of said boat was made of McLean and not of McLaughlin ; that there was no negotiation with McLaughlin, and no promise to him, unless the agreement of McLean and defendant, that defendant should take the boat as she stood subject to the liens upon her, and that was the only contract. That at the time of the sale neither McLane nor McLaughlin were present ; thinks the claim of Cotton was in the hands of the sheriff at the time spoken of ; that he was acting as deputy sheriff, and that the sale was not made for the reason that defendant took the boat and agreed to pay the liens against her.

The plaintiff recalled George Keys, who testified, that the sale was made to Mallory, to secure witness against liability as security for said boat ; that McLaughlin was considered as the owner, and never heard McLean mentioned in relation to the sale of said boat ; that McLaughlin was about the boat up to about the time the boat was sold.

The court then gave the following instructions, to which defendant excepted. " If the jury believe from the evidence that the defendant agreed with McLaughlin to pay the debts of the steam boat Tioga, and received said boat in consideration of said agreement, they should find for the plaintiff, provided they find from the evidence there was a debt due from the boat, and McLaughlin as owner thereof, to Cotton."

" That if defendant made a general promise to pay the debts of the boat, that such promise would enure to the benefit of the owners at the time the debts were contracted, if in consideration thereof he got the boat."

The defendant then asked the following instructions, which the court refused, to which refusal defendant excepted.

" That if no contract was made between McLaughlin and the defendant as to paying the debts of the steam boat Tioga, the jury will find for the defendant."

" That although the jury should believe from the evidence that defendant agreed with Washington McLean to pay the debts of the Tioga, such agreement would not make the defendant liable in this action."

The defendant filed his motion for a new trial, which was refused, to which refusal defendant excepted, and brings the case to this court by appeal.

CROCKETT, & BRIGGS, & WHITTLESEY, for appellant.

1st. The court erred in giving the instructions asked for by plaintiff, and in refusing those asked for by defendant, for this reason, that the benefit of the promise, if any such was made by the defendant, enured to the creditors of the boat, and not to the owners. Robbins vs. Ayres 10 Mo. Rep. 538; Bank vs. Hackney 10 Ib. 519, 524. It was a promise to A by B for a consideration moving from C, and two parties cannot have an action against a third for the same identical cause of action at one and the same time. The court therefore erred in giving the first instruction asked by the plaintiff, for the promise was not to pay McLaughlin the money, but to pay the debts of the boat, and the suit should have been brought in the name of Cotton. Besides, if McLaughlin might have sued the defendant because he did not pay the debts of the boat, he might sue in a separate action for every debt that the defendant neglected to pay, and thus there might be

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several suits for one and the same cause of action, to wit: the neglect to pay the debts of the boat. For the same reason the court erred in giving the second instruction asked by the plaintiff, and in refusing the second instruction asked by the defendant. The party in whom is the legal interest, must sue, and McLaughlin had not that interest in defendant's promise. 1 Chit. Pl. 1, 2, 4, 5.

Besides the verdict was against evidence. The promise proved on the trial was to McLean if to any body, for he had the interest in the boat subject to the payment of the debts, as appears from the writing or instrument offered in evidence, and the assignment thereof from McLaughlin to McLean. After McLaughlin's assignment to McLean, the plaintiff had no interest in the boat. The court therefore erred in refusing the first instruction asked by the defendant.

And for the errors committed by said court, its judgment should be reversed.

1st. The plaintiff has no right to sue on the promise of the defendant, because he had no interest in it.

2d. The promise did not enure to the plaintiff but to Cotton, who should have sued upon it, and can still sue upon it, if it was a valid and legal claim against the defendant on his promise to pay the debts of the boat, as the legal interest was in Cotton.

3d. The verdict was against evidence, the weight of evidence and the law.

HUDSON, for appellee insists :

1st. The agreement set out in the declaration shows a good and sufficient consideration for the promise. It is manifest from the evidence that Cotton had a good cause of action against the steamer "Tioga" as well as against McLaughlin the owner; that he had commenced proceedings against said boat under our statute, and the boat was in the custody of the sheriff and advertised for sale to satisfy the claim of Colton and others, which were liens on the boat. The sale would have taken place and the claims paid, but for the influence of Belt the appellant, who by an express agreement undertook and promised, that if the sheriff would stop the sale he would pay all the claims against the "Tioga." The sheriff did not sell. Belt, under his promise, obtained possession and control of the boat, and subsequently paid most of the demands against the boat, pursuant to his agreement. In the case of Smith vs. Weed 20 Wend. 184, the court held that the release of a lien obtained by the issuance of an attachment is a good consideration for a promise to a third person to pay the debt of the party proceeded against by such process. It will not be denied that the obtaining possession of property taken under attachment, or by virtue of a warrant under our statute relative to boats and vessels is a good and sufficient consideration to sustain a promise.

2d. An act lawful in itself which is for the benefit of one party or to the prejudice of another, constitutes a sufficient consideration to support a promise. 3 Scōm. Rep. 329. It is manifest that the act of Belt in obtaining possession of the boat was to his advantage and to the prejudice of both McL. & C. It is clear that the boat would have been sold, and for an amount sufficient to have paid *all* the claims against her, but for the fact that Belt expressly agreed to pay them—had the sale taken place all the claims would have been paid—McL. would have been released from any liability to Cotton, and the claim of Cotton paid without delay. The failure of Belt to comply with the agreement was to the prejudice of McL. and also to C. 5 Stanton 450; 2 East. 325.

3d. When one person has voluntarily received a benefit from another, or has been the cause (without sufficient excuse) of loss to another, there arises a moral obligation to compensate him for the benefit secured or loss sustained, and the law will enforce the duty. In this case it is not denied that the steam boat "Tioga" was liable to Cotton; he had a lien on the boat and would have enforced it, but for the undertaking of Belt—he prevented the sale in consequence of which Cotton's claim was not paid. It is clear that McL. to the extent of Cotton's claim was prejudiced,

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and Belt to a like extent benefitted, and should be held responsible to the extent of the benefit received. See 9 Shepley 475. This authority will be found in 22 Maine Rep. 475.

4th. A promise by one person to do an act for the benefit of a third, is a sufficient consideration to support an action against the person promising. 1 Cain's Rep. 45. So the _____ of a legal right at the request of another is a good consideration to support a promise by law. 2 N. H. Rep. 97; Ib. 352.

5th. With respect to the certainty of the parties necessary in describing the promise in special assumpsit, it must appear who made the promise, and to whom it was made, though it is not necessary that it should appear to have been made to the plaintiff, for in some cases one man may maintain an action upon a promise made to another, if it be to do a thing for his benefit, or the party to whom the promise was made may sustain the action. Lawes on Pl. 88.

6th. When a promise is made for the benefit of the plaintiff it matters not to whom the promise was made, and either he or the promisee may maintain the action, and where the act is promised to be done to or for the benefit of the plaintiff, it may be intended that the promise was made to him. Lawes Pl. 91.

7th. The conduct of Belt according to the testimony of the witnesses, was inconsistent with strict integrity and fair dealing: he has reaped the benefit of McL.'s property without paying for it, and now seeks to avoid judgment even after his express undertaking to discharge this and other demands. The only questions of fact in the case were submitted to the jury, and they have found in favor of the plaintiff below. From all that appears on the record, judgment was given for the right party, and it is not now important to enquire whether the court of common pleas committed an error or not. If justice has been done, this court will not disturb the judgment below. 7 Mo. Rep. 419.

8th. Judgment will not be arrested, because the declaration is defective, if it has substance sufficient to found a judgment on after verdict. Reily 170.

9th. When a promise is made to A for the benefit of B, and an action brought by B, the promise must be laid as being made to the latter, and the promise actually made to A may be given in evidence to support the declaration. Lawes on Pl. 88-9; 1 Bos. & Pul. 101; Cowp. 443; 12 John Rep. 276.

10th. Where an improper judgment produces the proper result, it will not be reversed. 3 Stew. 38.

Judge BIRCH delivered the opinion of the court.

Adopting, in this case, the statement agreed upon, by the counsel, and the jury having found, from the evidence, under proper instructions from the court, that the defendant agreed with McLaughlin to pay the debts of the steamer "Tioga," and receive the boat in consideration thereof—and that there was a debt due from the boat and McLaughlin as owner, to the plaintiff—the only question remaining for the consideration of this court, since its repeated reaffirmance of the principle of liability recognized in the case of Robbins vs. Ayres (10. Mo. Rep. 538) has reference to the party who was entitled to sue.

In one of the earliest treatises on pleading, Lawes 88-91, it is laid down that in cases similar to the present, there should be an option as to the party who might make himself the plaintiff; and as the other authorities and cases to which we have been referred, present at the

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most but an unsatisfactory conflict of opinion and decision, the point should be ruled for the plaintiff.

The judgment of the court of common pleas is, therefore, affirmed.

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In an action of assumpsit instituted by plaintiff against defendant for services as agent, it is competent for the defendant to set off amounts of moneys collected for him by the plaintiff while in his employ, without proving a demand prior to the time of instituting the suit.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

HILL, for appellant.

1st. The unsealed admission of Paul, dated 15th Feb. 1846, referring to the sealed contract, varied from the bill of particulars both as to description and time employed, and no notice was conveyed by the bill of particulars, that any such paper existed. It should have been excluded. 2 Boss, & Pall 243; 3 Esp. 168; 4 Esp. 7; 1 Taunt. 353; 1 Esp. 452; 2 Sell. 339; 2 Wend. 577. (a) This point is properly saved in the bill of exceptions, and is very simple when the court examines the objection made. 1 Wendell 602.

2d. The common pleas erred in refusing to admit the testimony offered by the defendant, unless demand was made before the suit was brought, showing that Carroll had received \$2,543 of Paul's money which he had not accounted for.

(a) Carroll, as Paul's clerk, to receive rents, having sued his employer for wages, had no legal right to object that the moneys he had appropriated to himself in that employment, should be set up as a payment or a set off.

(b) The law will apply it as a payment of Carroll's claim *co instanti*.

(c) By the law of principal and agent, Carroll was not entitled to object that no demand had been made, for he had been guilty of misfeasance and malfeasance both, and by the nature of his employment, he was required to account and pay over to Paul at reasonable times, and his failure to do so would authorize suit by Paul without demand. Amer. Lead Cas. vol. 1, 519, 520 Clark vs. Moody 17 Mass. Rep. 148, 150; Toney vs. Bryant 16 Pick. Rep. 528; Lilly vs. Hoyt 5 Hill 396; Hawkins vs. Walker, 4 Yerger 188; Estes vs. Stokes 2 Richardson 133.

(d) Carroll's fraud and malfeasance clearly appears from the record, for his abstraction and appropriation of Paul's money extended through a period of two years; and this suit against Paul precluded a demand and waived it if it was necessary.

2d. The court of common pleas erred in giving the instructions asked by plaintiff, and in refusing to give the 4th instruction asked by the defendant.

(a) These instructions of the plaintiff misled the jury, by requiring a certain description of proof in relation to the written admission of 15th February 1846.

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(b) There was abundant evidence to support the 4th instruction of defendant, which was refused, and this prejudiced the defendant's case unlawfully.

TODD & KRUM, for appellee.

1st. The first error assigned by the appellant cannot be available to him, because no motion in arrest of judgment was made in the court below. Admitting that the declaration is defective, or that there was no declaration, the objection is cured by verdict. At all events, the question sought to be raised under this error, as to the sufficiency of the declaration, cannot be considered in this court.

2d. The court below committed no error in allowing both written agreements to be read in evidence under the declaration and bill of particulars. The agreement dated May 1st 1844, (being a covenant under seal) was read without objection, but it was competent evidence, if objection had been made. The second agreement, dated 15th Feb. 1846, was properly admitted in evidence under the declaration and bill of particulars. It was offered not as the foundation of the action, but merely as evidence tending to prove the third item in the plaintiff's bill of particulars.

The law is now well settled, that when there has been a special contract, the whole of which has been executed on the part of the plaintiff, and the time of payment on the part of the defendant is past, general assumpsit can be maintained, and the measure of damage will be the rate of recompense fixed by the special contract. 7 Cranch 290; 11 Wheaton 237; 9 Peter's Rep. See the rule as settled and laid down in note to case of Culler vs. Powell, in 2d Smith's leading cases page 19 et seq.

3d. The objection to the reading of the paper dated Feb. 15th 1846, is general, and the grounds of the objection do not appear on the record. The ground of the objection is now stated *ore tenus* in this court, to wit: that there is a variance between statement in the 2d item of the bill of particulars and the paper offered in evidence. A general objection to the competency of testimony, without stating the point or ground of objection, is never considered in nisi prius trials. But allowing that the objection may be considered by this court, there is in fact no variance. This is settled by long established and unvarying rules of law on the subject of variance. 1 Greenleaf on ev. sec. 63, 66, 67.

4th. The court below did not err in excluding the testimony offered by defendant, designed to show that Carroll, while acting as agent for Paul, had collected rents &c. for Paul. 1st. Because it appeared in evidence, and so it was admitted at the trial by defendant, that Carroll had been acting as the agent or employee of Paul for the collection of his rents, keeping books, writing deeds, &c.; and that the moneys (if any) sought to be set off, came to Carroll's hands by collections made by him while acting as such agent, and it was not shown that any previous demand had been made of Carroll for said money, nor any order or direction given him in respect to their payment or disposition.

In support of the first branch of the proposition stated under this point, the following reasons are stated and authorities cited. The proof offered, if competent, and offered to establish a set off, which is in the nature of a cross action. To entitle Paul to the benefit of his pretended set-off, he must have been in a condition to maintain a suit against Carroll for the same debt at the time he offered to give proof of the set off. He was not obliged to set off his demand. That previous demand must be made of an agent before suit brought, for money, goods, or property in his hands, is clearly established by the following adjudged cases. 2 Mo. Rep. 199; 3 Ib. 315; 11 Ib. 114; 3 Blackford 251, 324; 1 Mason C. C. 440; 6 Porter (Ab.) 32; 5 Ab. 84; 1 Dev. (N. C.) 79; Comyers Dig. 261: 17 Mas. 145, 149.

5th. The court below did not err in overruling the motion for a new trial. 1st. Because there was a second application for a new trial, and the court below was restricted in its powers by statute, and the jury did not err in a matter of law. Vide Rev. Laws p. 830. 2d. Because the

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instructions given are legal, and the instruction asked by defendant, and refused by the court, was illegal. 4 Mo. Rep. 86; 7 Ib. 57 259; 9 Ib. 314.

6th. From all the testimony in the case (even upon the testimony and admissions given by the defendant himself) it is manifest that there was a balance due from Paul to Carroll at the time this suit was brought. If, then, the evidence offered by defendant, and excluded by the court, was correctly ruled out, the judgment of the court below must stand, for there is no motion to set aside the verdict on the ground that the damages are excessive.

Judge BIRCH delivered the opinion of the court.

A single question arises from an inspection of the record in this case requiring the interposition of this court. The action was assumpstion, on the common courts, to which the defendant pleaded the statutory general issue.

Upon the trial in the court below, after the plaintiff had closed his testimony, the defendant offered in evidence accounts of rents &c., of Paul's kept by Carroll, showing that from May 1st '44 to Nov. 1st '46, Carroll had received \$2543 of Paul's money, which he had not accounted for, and offered to prove the items by witnesses. The plaintiff objecting, the court excluded the testimony, on the ground that there was no proof that the money had been demanded, prior to the bringing of this suit, and to this the defendant excepted. Carroll had been acting as agent for Paul in settling accounts, keeping books, collecting moneys, &c., but had been out of his employment several months before the commencement of this suit. Indeed the suit grew out of the services alleged to have been rendered in that capacity. Such a case, therefore, seems to us to have no just analogy to those to which we have been referred—proceeding as they generally do, upon the assumption that the money was received by the agent to await the instructions of his principal. Here the reverse was the case, not only from the nature of the business, (including the every day association of the parties, under the same roof) during the *time of the agency*, but from the antagonistic relations subsequently produced by the plaintiff himself in the commencement of this suit, which, of itself, we think should be held equivalent to a request—had one been necessary, at the most, however, the plaintiff should be regarded as coming within that description of collecting agents "whose duty it was to receive money and pay it over in a reasonable time, and therefore liable to a suit without demand." Am. leading ca. p. 520. Upon the whole, we think the testimony excluded should have gone to the jury. The judgment of the court below is therefore reversed, and the cause remanded.

BECKWITH Adm'r OF SMITH vs. BOYCE.

BECKWITH ADM'R OF SMITH vs. BOYCE.

When a judgment is rendered for a greater amount of damages than that laid in the declaration, it is error; and the judgment should be reversed.

ERROR TO ST. LOUIS CIRCUIT COURT.

Boey for plaintiff.

1. The judgment below is erroneous because it is for a greater sum than is laid in plaintiff's declaration. 2 Blackford 459, Johnson vs. Hawkins; 3 Blackford 133, Phillips vs. Nichols; U. S. Digest, vol. 2; p. 665; 2 Howard's Mo. Rep. 686, Potter vs. Prescott.

2. Where a judgment in an action of assumpsit is for a greater sum than the damages laid in the declaration it is error. 1 Mo. Rep. 615, Johnson vs. Robertson; Carr &c. vs. Edwards, 1 Mo. R. 137; Maupin vs. Triplett, 5 Mo. R. 422.

Polk for defendant.

1. The only mode of taking advantage of a merely defective or imperfect finding of a jury is by motion in arrest of judgment. Finney et al vs. The State 9 Mo. R. 636; Davidson vs. Peck 4 Mo. R. 445.

2. This court is one whose jurisdiction in all civil actions between citizen and citizen is exclusively appellate for the correction of errors by the inferior courts of record, and therefore it will not reverse the judgment of the inferior court for any matter which is not distinctly brought before that court and passed on by it. State constitution; 4 Wend. 182 et seq. Houghton vs. Starr; 2 Wend. 144; 2 Cowen 31; 17 John. 469 Henry vs. Cuyler.

3. I assume the position that the mere circumstance that the verdict was for a greater sum than the damages laid in the declaration, ought not to be sufficient ground for reversing the judgment.

4. The affidavit of the attorney of record filed in this court shows that it was by his mere oversight and default that the damages laid in the declaration were less than the amount found by the jury. And it is expressly enacted by the legislature that the judgment shall not be reversed for any default or negligence of the attorney, by which neither party shall have been prejudiced. Code of 1845, p. 827-8 sec. 7.

Judge NAPTON delivered the opinion of the court.

In this case the damages found by the jury, exceeded those laid in the declaration, and the judgment was in accordance with the verdict. There was no motion in arrest in the court below. In accordance with the previous decisions of this court, the judgment must be reversed. Carr vs. Edwards 1 Mo. R. 137.

Judge BIRCH dissenting.

I am unable to perceive any thing in the reason of the rule relied up-

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on in this case, to demand the reversal of the judgment. The verdict of the jury, in finding the issues for the plaintiff, and assessing his damages at 674 dollars, was the only means they had of saying that *at the time of writing his declaration, or bringing his suit,* the defendant had damaged the plaintiff five hundred dollars, and that during the six or seven years intervening, between that period and the time the defendant permitted it to come to a final trial, (which it has not, even yet,) the interest justly accruing on the sum found to *have been due* should be added. This, I respectfully submit, though it be against all *previous authority*, should *not* be held to be a finding beyond the claims of the declaration. Its language, in this case, as is usual, is to the effect that the plaintiff *hath* sustained (not *will* sustain) damages in a given sum, and that *therefore* he sues—and I can but deem it more natural as well as more just, that this averment, or “count,” should be held, in opposition to mere legal fiction, to have relation to the time of *suing*, instead of the indefinite period of bringing the cause to final trial. There being, therefore, to my mind neither reason nor justice in compelling this plaintiff to go back to the court below and pay the costs of amending an originally good declaration, in order to commence his suit anew, I think we should at least properly modify the unnecessary and undiscriminating harshness of the rule, rather than contribute longer to perpetuate it.

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A decree of the circuit court which is warranted by the facts of the case will not be disturbed.

APPEAL FROM ST. LOUIS CIRCUIT COURT.

SHREVE for appellant.

The complainants insist they are entitled to a decree, 1st. Because Cassada's judgment is older than the record of the deed. “The lien of a judgment will hold good against a prior unrecorded deed,” 1st Dana Ky. 168. Hill vs. Paul 8th Mo. Page 479, Reed. vs. Austin's heirs 10th Mo. p. 722.

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Frothingham et al vs. Stacker, 11th Mo. p. 77. This case is stronger than any of those cited, no *deed* but *mere assignment* before judgment recovered.

2nd. Complainants contend the transfer or assignment by Warfield to Shields was and is void so far as they are concerned—said assignment never having been acknowledged as required by the statute. Rev. stat. sect. 16 p. 221. Nor was said assignment recorded, Rev. stat. sec. 40, 41, 42, page 226.

It is also insisted under the evidence, that McDowell's judgment vs. Warfield is good although obtained subsequent to the record of Shields deed. Because said sale by Warfield to Shields, through Bolton, was *fraudulent* and *void*, as to prior creditors, sec. 2, Rev. S. p. 525—a debtor may prefer one creditor to another, Sibley vs. Hood 3rd Mo. 230, Bell vs. Thompson 3rd Mo. 84.

HUDSON for appellee.

Warfield never had any title to the land in question or any interest therein which could be sold under execution, consequently complainants acquired no title under the purchase at Sheriff's sale. The holder of a title bond has no interest in the land which can be sold on execution until the full payment of the purchase money be made according to the conditions contained in the bond, 4 Mo. Rep. 62; 10 Ib. 398 17 John R. 351 7 Smedes & Marshall 119 Ib. 651, 13 Peters 294, 18 Wend. R. 236.

2nd. Warfield had delivered possession of the land in question to Shields, and assigned the bond set out in the answers long before any judgment had been rendered against Warfield, and before any execution issued against him. At the time of the rendition of the judgments offered in evidence, Warfield had no right, title, claim or interest in the land in question, nor did he at any subsequent period, have any interest therein either legal or equitable. See answers and the bond proven on the trial and given in evidence on behalf of defendants. The said Warfield had no interest whatever in the land when the judgment was rendered.

3rd. The answers deny all fraud and collusion on the part of defendants—the answer of Shields shows the payment to Warfield of the full value of the land in question. Bolton denies in express terms the charges of fraud &c., in the bill, and denies that the deed to Shields was made for the purposes charged by complainants. These answers are conclusive unless contradicted by two witnesses or one credible witness with corroborating circumstances.

4th. The whole evidence and proofs were left to the court, no instructions were asked by the complainants, the court setting as a jury, found upon a full investigation of the testimony and proofs, in favor of the defendants, and dismissed the bill. There was no error in any matter of law of which the plaintiffs can complain, as the court was not called on to declare the law. As to the evidence offered at the trial, the court below was the proper judge of the weight to which it was entitled, and the court will not set aside or disturb the finding of the circuit court unless such finding was clearly against the evidence. This court will not interfere under the circumstances of the case, 9 Mo. Reps. 48, 49, 50, Ib. 291, 379.

5th. The alleged newly discovered evidence, even if it had been given on the hearing of the bill, as set out in the affidavit of McCullough, would have had no influence upon the decision of the cause. The affidavit of L. M. Shreve, one of the solicitors for plaintiffs, does not show that complainants were ignorant of the existence of the supposed testimony before the trial.

Judge NAPTON delivered the opinion of the court.

This was a bill in chancery brought by the judgment creditors of one

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Warfield to set aside certain conveyances alleged to have been fraudulent as against the complainants.

The complainants, who were creditors of Warfield, had purchased his interest in a tract of land under executions upon two judgments;—one obtained by themselves against Warfield on the 18th March 1847 and the other obtained by one Cassada on the 13th Oct. 1845.

In the year 1835 Warfield had purchased this tract of land from Bolton (one of the defendants,) and gone into possession, but received no conveyance—a bond for a title upon the payment of the purchase money was given to him. On the 18th Feb. 1845, Warfield assigned this title bond to Shields (the other defendant) who took possession on the 1st March 1845. There is some diversity of testimony as to the fact, whether Warfield had paid all the purchase money or not. On the 27th April 1846, Bolton conveyed by deed to Shields, the latter having paid off whatever was due from Warfield. This deed was recorded 2nd May 1846.

The bill seeks the interposition of this court upon two grounds. The first is based upon the hypothesis that the transactions above stated were bona fide, and assumes, that under the decisions of this court, the complainants have the better title, because the deed from Bolton to Shields was not recorded until after the judgment of Cassada.

The doctrine in Hill vs. Paul 8 Mo. R. and Reed vs. Austin 9 Mo. R. we consider inapplicable. The judgments of the complainants were not given against the vendor Bolton, but against Warfield, who at the date of the judgments, had no interest either equitable or legal in the land. He never had any legal title, and he had transferred his equitable title to Shields. So that, taking the transaction to have been an honest one, Warfield had nothing upon which the judgement could operate.

The bill however charges that this assignment of Warfield to Shields and the conveyance from Bolton to Shields, were fraudulent in fact and designed to protect the lands in question from the creditors of Warfield. Upon this point there was some testimony, but the circuit court decreed against the complainant. An examination of the testimony preserved in the bill of exceptions, and copied in the statement of the case, will show that there was no satisfactory proof that Shields' conduct or motives in the transaction were at all questionable; Shields was a creditor of Warfield, and had a right to secure himself, and his diligence in procuring the title from Bolton before the judgments against Warfield, could form no just ground for imputing fraud. We shall therefore confirm the decree of the circuit court.

 CARROLL vs. THE CITY OF ST. LOUIS.

CARROLL vs. THE CITY OF ST. LOUIS.

1. When the "city attorney" for the city of St. Louis, performs a duty imposed by ordinance, he is entitled to the compensation therefor, fixed by ordinance, and no other,
2. The mayor of the city of St. Louis has no authority, under the city ordinance, to appoint an attorney so as to make the city liable for his services.

APPEAL FROM ST. LOUIS CIRCUIT COURT.

STATEMENT OF THE CASE.

The appellant brought suit to the November term 1848 of the St. Louis circuit court in, assumpsit, to recover compensation for legal services rendered as an attorney and counsellor at law for the defendant, at the request of the then mayor of the defendant. The bill of particulars were as follows:

To the city of St. Louis to C. C. Carroll, Dr. 1846. To professional services and attention to two hundred cases before the recorder of St. Louis, of free negroes arrested for being in the State of Missouri without a license, at one dollar per case.....	\$200 00
To professional services and attention before the county court of St. Louis county for two weeks in cases of free negroes applying for license to remain in this State..	100 00
To attention in the supreme court of Missouri to the case of the city of St. Louis vs. John Smith.....	50 00
To attention in the supreme court of Missouri to the case of the city of St. Louis vs. John Bentz	50 00
To attention to the case of a free negro (Charles Lyons) in an application by him to judge of the St. Louis circuit court for discharge under the habeas corpus act..	50 00

Total..... \$450 00

In an agreed case made between the plaintiff and defendant in the St. Louis circuit court, it was admitted by the defendant that said services were rendered; that they were rendered at the request of the then mayor of the city of St. Louis, who was duly elected, commissioned and qualified; and also that the charges made in the bill of particulars are reasonable.

It was admitted by the plaintiff that at the time of the request of the said mayor, and the rendition of said services, that the plaintiff was the city attorney of the city of St. Louis; and it was also admitted that the cases of Smith and Bentz in the supreme court, originated before the recorder of the city of St. Louis.

It was also agreed by both parties that the charter and ordinances of the city of St. Louis published by authority of the city council of St. Louis in 1846, be admitted in evidence in the circuit court, and they are mutually admitted as evidence without further proof, in the supreme court. Upon a hearing of the admissions and evidence before the circuit court of St. Louis county, a non-suit was entered by the court, with leave for a motion to set the same aside and grant a new trial, (agreeably to agreement that a non-suit should be entered if the facts and law did not warrant a judgment for the plaintiff; and that either party might take an appeal to the supreme court.) The motion made to set the same aside and grant a new trial for reasons filed was overruled—bill of exceptions filed, and the same appealed to this court. The questions to be decided by the supreme court are: Was it the duty of the appellant to render said services as the city attorney of the defendant? Had the mayor of the city of St. Louis authority to retain the counsel, and is his employment of such counsel binding upon the city of St. Louis, and is the city responsible for such services?

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EAGER, for appellant.

1st. It was not the duty of the appellant as the city attorney of the appellee to perform any of the legal services upon which the suit was instituted, because said duty by an ordinance of the appellee, approved July 20th 1846, is defined as follows: "It shall be the duty of the city attorney: First: to prosecute before the recorder or justices of the peace, all actions on behalf of the city, and defend before those officers, all actions against any officer, servant or agent of the city on account of his legal official acts. Second: to prosecute or defend in any court of record in this State, any suit or action originating there, when required by the mayor. Third: to take an appeal on writ of error on behalf of the city in any case he shall see proper, and make the necessary affidavits therefor, and execute the necessary bond in the name of the city. Fourth: to attend in appellate courts to all appeals or writs of error in cases originating before the recorder or justice of the peace. Fifth: to advise the city council or their committees, or any city officer as the counsellor is required to do." Revised Ordinances of city of St. Louis of 1846, page 122.

2d. The mayor was authorized to employ counsel in any case, because it is provided in 3d section page 122 of said ordinance, that "assistant counsel may be employed in any case at the discretion of the mayor or city council."

3d. All the services rendered by the appellant, (except those in the supreme court) were in proceedings under the general laws of the State, and not under or arising out of the charter or any ordinance of the appellee. Revised statutes 295, 392.

4th. The mayor of the city of St. Louis is required to *take care* that the laws of the State are duly enforced, respected and observed within the city. Charter of city of St. Louis, art. 4 sec. 7. The employment of means by which to discharge this duty, are necessarily incidental to the duty, and as no particular means are pointed out in the charter, he is entitled to the exercise of his own sound discretion in any given event.

5th. The appellee is responsible for the employment of the appellant by the mayor. 7 Cranch 306; 14 Mass. 61; 3 J. J. Marshall 203; 1 Dana 87; 1 Cowen 513; 14 John 118; 1 Saxton Chancery Reports 511; 12 John 227.

BLANNERHASSETT, for appellee.

1st. The office of city attorney is created by charter, and is an elective office. The office of city counsellor is created by ordinance, and is filled by appointment. The duties of each of those officers are prescribed by ordinance, and specifically defined, and their compensation fixed by ordinance also. Charter of 1843 sec. 10 p. 93; Ord. No. 1698 art. 5 page 241 sec. 1.

2d. Whenever a duty is imposed on the city attorney by ordinance and that duty is performed, he is entitled to the compensation therefor fixed by ordinance, and no other.

3d. The services rendered by appellant as appears from bill of particulars were such as he was required by ordinance to perform. See second clause of 4th sec. of ordinance No. 1686, page 122.

4th. The third section of the ordinance referred to authorizes the Mayor at his discretion to employ assistant counsel in any case, and the fifth section of the same ordinance authorizes that officer in the event of the absence from the city of the city attorney or city counsellor, or their inability to attend any court from sickness or otherwise, to approve of the appointment of another to attend to the official duties of the officer so absent, but this appointment must be at the expense of the attorney or counsellor and not at that of the city. The same section also authorizes the Mayor to appoint some person other than the city attorney or counsellor to represent the city, where in any case either of these officers is obliged to dis-

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charge that duty and cannot do so because of his being employed against the city before he assumed the duties of his office. Except therefore, in the cases enumerated in the ordinance, it is contended that the mayor has not the power to employ counsel at the expense of the city, because the power being given in specific enumerated cases excludes the exercise of such power in any other; and to entitle the plaintiff or appellant to recover, he should aver in his declaration, or at all events prove that he rendered the services at the request of the mayor as *assistant counsel* or by *appointment* from the mayor according to the provision of the last clause of the 5th section of the ordinance.

The duty imposed on the mayor by charter to "see that the laws of the State are observed" &c., do not authorize him to run the city in debt *ad libitum* and unnecessarily.

Judge NAPTON delivered the opinion of the court.

We do not deem it important in this case to determine, whether the professional services rendered by the plaintiff could have been required of him as city attorney or not. That a portion of the cases fell properly within the duty of the city counsellor is quite obvious. However this may be, we are of opinion that the ordinance which prescribes the duties of these officers, designed to secure the services of one or the other of them in every case where legal services were supposed to be necessary. If the language of the ordinance should be thought not sufficiently explicit to attain this purpose, it is however clear, that the mayor has no authority under it to appoint an attorney so as to make the city liable for his fees. The only clause in any section of the ordinance which can possibly be construed to vest such a power in the mayor, is the third section, which says that "assistant counsel may be employed in any case at the discretion of the mayor or city council." We apprehend the obvious meaning of this provision is to authorise the mayor, in cases whose importance might suggest the propriety of employing additional counsel to assist the regular city officer, to employ such *assistant counsel*. The case agreed does not show a state of facts having any reference to such a contingency.

The services sought to be recovered in this action against the city were rendered by the city attorney, at the suggestion of the mayor, and were either rendered in his capacity of city attorney and therefore remunerated by the salary which the law had fixed, or they were rendered voluntarily at the instance of the mayor, who had no authority to bind the corporation in the case supposed. It cannot be contended, that the general authority which the charter has given to the mayor "to take care that the laws of the State and the ordinances of the city are duly enforced," could authorize this officer at his discretion to employ independent counsel in any case. Such a latitudinous construction of the

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charter would put it in the power of that officer to confide any of the official duties of any of the subordinate officers, specially provided for by charter or by ordinance, to such persons as he might select, disregarding entirely the duties and powers incumbent upon such as had been duly elected or appointed to such trusts in conformity to the charter and ordinances of the city.

We are therefore of opinion that the professional services of the plaintiff were either such as the duties of his office imposed upon him, or if not, that the mayor had no authority to bind the city for the payment of his fees and therefore shall affirm the judgment of the circuit court.

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1. The *holder*, of a negotiable note under the statute, endorsed by the payee to A or bearer, is considered the legal owner.
2. A chose in action which is assignable cannot be set-off by a person to whom it is transferred, if he holds it merely as a trustee.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

This was a suit at law to foreclose a mortgage made to George Morton by McDonald and wife and by them assigned to Alfred Tracy and by Tracy to the plaintiff.

On the trial of the cause the plaintiff, proved by B. B. Dayton the assignment of the mortgage by Morton to Tracy and Morton's endorsement on the six notes secured by the mortgage. Witness knew nothing of the transactions except from seeing the assignment in his own hand writing and that he wrote the assignment at Morton's request. The assignment to Tracy was acknowledged and recorded in 1841.

J. J. Anderson then called for plaintiff, proved the assignment of mortgage by Tracy to Harrison. On cross examination testified, that in May or June 1847, Morton came to him to raise money on the notes and that being all due, he refused at first to take them, but as Morton insisted he let him have \$100 on the notes; that some time after he wrote to McDonald to come and take up the notes and that McDonald then served a notice upon him that he had paid the notes or had a defence against them—that then he called upon Morton to come and pay the \$100 and take up the notes, Morton said they were Tracy's and that Tracy would settle it when he came up from New Orleans. When Tracy came up, he said he would ar-

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range it and brought Harrison to the office and Harrison paid the \$100 and the assignment was made to Harrison—thinks he told Harrison of McDonald's notice. At the time Morton got the money, he said the mortgage was Tracy's. Plaintiff then read the mortgage, and an assignment of Morton to Tracy, dated October 1st 1841, transferring the mortgage and his interest in it, and the debt secured thereby. The assignment by Tracy to Harrison dated Oct. 1st 1847, was then read.

The plaintiff then read the notes sued on. These notes were negotiable notes under the statute, endorsed, pay Alfred Tracy or bearer, George Morton. It was admitted that the endorsement was filled up by the attorney previous to bringing the suit. The plaintiff then closed his case, and the defendant asked the court to exclude from the jury, the notes given in evidence by the plaintiff, there being no assignment of said notes to the plaintiff, and to instruct the jury that the plaintiff is not entitled to recover upon the case as made by him in proof, which instruction was refused—the defendant excepted at the time.

The defendant then called S. Jackson, who proved the endorsement of William Metcalf to Phillip McDonald of George Morton's note for \$600, this endorsement was made about July 1847, that Metcalf left the note in his hands to give to McDonald when he called for it, the note was as follows:

\$600 00

ST. LOUIS, October 1, 1838.

Three years after date I promise to pay to William Metcalf junior or order six hundred dollars.

GEORGE MORTON.

Endorsed. For value received I assign the within note without recourse on me in any event to Phillip McDonald or order.

WILLIAM METCALF.

The plaintiff objected to the reading the note to Metcalf and then and there excepted to the decision of the court allowing said note to be read.

Defendant then called John McDonald, who testified that he knew Morton; that Morton called on his father for money twice, first, early in 1846; that he received \$15. He called again in the fall of 1846—had a conversation with his father, and got \$20. More: After that he called again, and wanted money, and said the matter must be settled, that he Morton was much pressed for money, that he had waited a long time, and must have the money. In April or May, 1847, that he and defendant went to Morton's house, and defendant said that he had called to settle the mortgage. Morton, after a pause, said that the mortgage and notes were not in his possession, but that he would see about it on the morrow, and that he would meet McDonald next day.

Cross-examined—Stated that on his way to Morton's house his father stated that he had a note of Morton's of about the amount of the mortgage, and if Morton would agree to it the matter could be easily settled; but that Morton was not told that McDonald had such a note. This was before May 5th 1847—thinks a few days. McDonald had the Metcalf note at that time.

Defendant then read the notice of McDonald to J. J. Anderson, dated July 14th 1847, notifying him that McDonald held a legal payment and set off against the notes in Anderson's hands.

The plaintiff then in rebuttal introduced Archibald Carr, who testified that he knew of the arrangement between McDonald and Metcalf concerning Morton's note: It was transferred in July or August 1847, and the agreement was that McDonald was to give \$500 conditionally, the money was to be placed in my hands, and in case McDonald could use the Metcalf note as a set off against the mortgage given to Morton, then he was to pay the money over to Metcalf, but if it could not be used, he was to hand the money back to McDonald. The plaintiff then proved that during the summer of 1847, Tracy's family was in St. Louis, staying at Morton's, Tracy remaining in New Orleans, where he was said to be engaged in business. This closed the case on both sides. The court then gave an instruction as follows:

If the jury believe from the evidence that the defendant obtained the note offered as a set off from Metcalf, upon the understanding that it should be his property only upon the contin-

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gency of his getting the off set allowed, he cannot be regarded as the bona fide holder of the note and therefore it cannot be a set off in this action.

To the giving of which instruction the defendant excepted at the time.

The defendant then filed his motion for a new trial, which the court overruled, to which the defendant excepted and brings the case to this court by appeal.

WHITTESEY & CROCKETT, for appellant.

1. The court erred in refusing the instruction asked by defendant at the close of the plaintiff's case. It appears that the notes were never endorsed in full to Tracy, to correspond with the assignment upon the mortgage, and a special assignment of the mortgage would not carry the title to the notes without a delivery of the same. The notes were not delivered but remained in Morton's hands and he pledged them to Anderson, who received notice of the set off, at that time the notes were over due and Harrison was informed of the defence at the time he bought the notes. The notes were all over due at the time of the delivery by Morton to Tracy as far as appears by proof, and notes over due are liable to all equities between maker and payer. They then become subject to the general rule, that persons taking notes over due, take them *cum onere*. The notes are endorsed payable to bearer, the assignment of the mortgage is specially to Harrison, the evidence would hardly support the complaint.

2. The court erred in the instruction given as to the note offered as a set off by the defendant, for these reasons, 1st the suit was not upon the notes directly, taken by a *bona fide* holder for value before due, for there is no proof that the notes were ever delivered to Tracy, or that the deed of assignment was delivered, and as appears from testimony, they were taken by Tracy over due, and he received notice of set off at time of delivery of bills to him, and so did Harrison. The set off was therefore properly admitted in evidence and the instruction of the court took away the defendants case from the jury and left him no defence—Frazier vs. Gibson 7 Mo. 271, 2nd said instruction was wrong in this, that it was perfectly immaterial to the plaintiff what consideration McDonald gave for the note as Morton justly owed that debt, and the contract between McDonald and Metcalf was perfectly immaterial and into which the plaintiff had no right to enquire. Moore vs. Cordell 11 Mo. 614, 615, where the court decide that the consideration between assignor and assignee cannot affect the liability of the maker.

3. The instruction given was wrong in this, in allowing the written endorsement to be explained away by parol testimony and that too by a party having no concern with it, contrary to all law, evidence to vary a written statement is not admissible. Hightower vs. Ivy, 2 Porters Ala. R. 308, nor to show a note, absolute on face, conditional. Farnham vs. Ingham 5 Ver. 514.

The law of negotiable bills taken bona fide before due does not apply to mortgages, or petitions to foreclose.

MC PHERSON for appellee.

The instruction asked by the defendant below at the close of plaintiff's testimony was properly refused by the court. The interest in the notes was all conveyed by the assignment of the mortgage, if there had been nothing more, but aside from this the endorsement to Alfred Tracy or bearer would have authorized Harrison to sue in his own name. The question is so plain that I will not trouble the court with authorities on this point.

The mortgage sued or was assigned by Morton to Tracy in 1841 and long before any notes became due, this assignment was acknowledged and recorded with the mortgage on the 30th of December 1841 and thus became notice to all the world. The notes were negotiable notes

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and were endorsed by Morton, before they became due, so that in either view the debt was exempt from all offset against Morton. An offset cannot be made of a debt against any one other than the plaintiff on the record. Johnson vs. Bridge 6 Cowen 693. Wheeler vs. Raymond 5 Cowen 231. Holland vs. Makepeace 8 Mass. Rep. 418. Knapp vs. Lee, 3rd Pickering 452. Rev. Stat. Mo. 1005.

Harrison as the assignee of Tracy took the notes exempt from all claims against Morton. His purchase was bona fide, without fraud, and even if he had notice of the claim against Morton, he had a right to look to the date of the assignment to Tracy for his protection.

Morton's possession of the notes and the pledging them with Anderson & Co. is easily explained. Tracy was the son-in-law of Morton—was engaged in business in New Orleans, his family were spending the summer at Morton's house in St. Louis, and Morton may have with propriety acted as the agent of Tracy and been anxious to raise money for the use of Tracy's family.

The instruction given by the court was correct, the testimony of Carr shows that the note was only conditionally sold to McDonald. That in truth McDonald held the note as an escrow or as trustee dependant upon the success that might attend his efforts to get set off against the notes executed to Morton, if he failed it was no purchase, consequently he was not a bona fide holder, but held it virtually for Metcalf's benefit. Babington on set off, 12, 13, 4th Lane Library, 16th East 130.

The authorities cited by appellant's counsel to show that parol testimony cannot be introduced to explain the assignment, have no application to such a case as this. If they did the objection comes too late, the witness Carr was re-examined without objection and he explained a part of the contract.

It is therefore contended—that the note offered in evidence could not be admitted as an offset against Harrison who stands as a bona fide holder for a valuable consideration, and therefore no error could be committed in excluding the note by the instructions, and secondly that the instruction was properly given because the evidence showed it was only a conditional property in the note held by McDonald as trustee of Metcalf.

Judge RYLAND delivered the opinion of the court.

From the statement of this case as agreed upon by the counsel, the only points presented for our adjudication are, first. The decision of the court below in refusing to exclude from the jury the notes given in evidence by the plaintiff, and in refusing to instruct the jury, that the plaintiff is not entitled to recover in this case from the evidence introduced herein by himself—secondly. In giving the instruction as appears from the statement as follows : "If the jury believe from the evidence that the defendant obtained the note offered as a set off from Metcalf upon the understanding that it should be his property only upon the contingency of his getting the offset allowed, he cannot be regarded as the bona fide holder of the note and therefore it cannot be a set off in this action."

This was a proceeding under our statute to foreclose a mortgage—the facts show that the mortgage had been assigned by Morton the mortga-

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ger, to Tracy ; that the assignment had been acknowledged and recorded. That the notes were endorsed by Morton, that is, that Morton had written his name on the back of the notes and that the lawyer had filled up the assignment before the suit was commenced.

It appears, that Tracy's family were living with Morton, and that after the notes were over due, Morton had offered them to J. J. Anderson, who refused to purchase them, but who let Morton have one hundred dollars on the notes. Anderson called on McDonald for the payment of the notes and McDonald informed him he had a payment or a good set off against the notes. Anderson then informed Morton of McDonald's refusal to pay and required Morton to pay him the money he had advanced him and take away the notes &c. Morton stated that Tracy would be up shortly from New Orleans and would attend to this business. That Tracy and Harrison came to Anderson's and Harrison paid up the money, the hundred dollars and that Tracy assigned the mortgage over to Harrison and delivered the notes to him. Anderson says that he thinks he told Harrison what McDonald said about his payment or good set off against the notes. These were negotiable notes and were endorsed "pay Alfred Tracy or bearer" George Morton. The plaintiff read the mortgage and the assignment to the jury and read the notes and endorsements to the jury. The defendant moved the court to exclude these notes from the jury and also moved the court to instruct the jury that the plaintiff could not recover in this case from his own showing. Both of which motions the court refused—and this decision of the court is the first point as above stated. I can see nothing authorizing the court to exclude these notes from the jury; nor is there any reason why the court should instruct the jury, that from the plaintiffs own showing he could not recover in this proceeding.

This point is therefore ruled for the plaintiff below.

The defendant then offered in evidence the note assigned to him by Metcalf—it was Morton's note to Metcalf for \$600, and was assigned by Metcalf to McDonald. The plaintiff objected to this note in evidence as a set off, but the court permitted it to go to the jury. The plaintiff then introduced as rebutting testimony a witness who stated that he "witness had a knowledge of the arrangement between McDonald and Metcalf, concerning the Morton note. It was transferred to McDonald in July or August 1847, the agreement was that McDonald was to give \$500 conditionally, the money was to be placed in my hands, and in case McDonald could use the Metcalf note as a set off against the mortgage given to Morton, then the witness was to pay the money over to Metcalf,

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but if it could not be so used, the witness was to hand the money back to McDonald ; McDonald gave the witness \$400 of the money which was still in witness' hands." There was no objection made to this testimony ; and the court thereupon gave the instruction as mentioned above, as the second point relied on by the plaintiff in error for the reversal of the judgment below. Had the defendant objected to the evidence of the witness in relation to the transfer of the Metcalf note to McDonald in the court below, in all probability the question would have been up before us, but he failed to do this. The point therefore about the introduction of parol evidence to vary or alter a written assignment by showing it to be conditional, and that the assignee was merely holding the note as trustee, although the assignment itself appears otherwise, was not raised in the court below ; and this court will not therefore say any thing about the law arising on that point. I shall consider the instruction as given upon the evidence without regard to the legality or incorrectness of the testimony itself. The evidence of the witness shows that the transfer of the note from Metcalf and McDonald was only conditional—that it was to be good or not as McDonald succeeded in using it or not as a set off against the mortgage originally given to Morton by him.

"A chose in action which is assignable cannot be set off by a person to whom it is transferred if he holds it merely as a trustee." See Babington on the law of set off and mutual credit, page 28 ; Law Library Vol. 4 ; see also 16 East. Rep. 136. "Where third person holding the acceptance of a trader, who was known to be in bad circumstances, agreed with defendants, as a mode of conveying the amount of the bill that, it should be endorsed to them, and that they would purchase goods of the trader which was to be paid by a bill at three months date or made equal to cash in three months (before which time the trader's acceptance would be due) but without communicating to the trader, that they were the holders of his acceptance ; the trader having become bankrupt and his assignees having brought assumpsit to recover the value of the goods sold and delivered to the defendant ; the court o King's Bench held that the latter could not set off the bankrupt's acceptance, which they did not hold in their own right, but in effect for such other persons." In my opinion, therefore, the court below did right in leaving the fact to the jury upon the instruction and in giving them the law as laid down therein. I am then for affirming the judgment, and my brother judges concurring herein, the same is affirmed. The words plaintiff and defendant are used in reference to the court below.

HEMMAKER vs. THE STATE OF MISSOURI.

HEMMAKER vs. THE STATE OF MISSOURI.

A person committing larceny abroad, coming into this State and bringing the stolen property with him, may be indicted, convicted and punished in the same manner as if the larceny had originally been committed here.

APPEAL FROM ST. LOUIS CRIMINAL COURT.

STATEMENT OF THE CASE.

This was an indictment found by the grand jury of St. Louis county against the defendant, Peter Hemmaker, charging him with grand larceny in the county of St. Louis.

On the trial of said indictment, the State introduced as a witness one John or Frederick Nahouse, who testified that himself and defendant were passengers on board the ship Washington, from Bremen to the United States; and that they landed at New Orleans, in the State of Louisiana, on the first day of January, 1848; that there was a large number of passengers on board the said ship; that he was slightly acquainted with Hemmaker. They did not sleep together. The said witness had in his possession a watch, which was stolen from his pocket on the morning they landed, between four and five o'clock in the morning. He did not know who took it, he was asleep at the time it was taken. The defendant slept on the opposite side of the ship from where witness slept; he did not see the defendant about his berth on that night. The witness further testified that the watch was worth twelve dollars, or that he gave that sum for it; does not know its value in New Orleans at the time he lost it—he made no search for the watch. Witness started for St. Louis the second day after he landed, and has resided here ever since. The defendant remained in New Orleans some three months after they landed, and then came to St. Louis. After he had been in St. Louis some short time, probably about a month, I asked him for my watch. He said he had no watch. I got a search warrant, went with the officer to the house he boarded at, and he gave up a watch that I recognized to be mine. Hemmaker knew my watch as well as I did. The witness further testified that he could not tell why he suspected the defendant for stealing his watch.

The State introduced another witness to prove the identity of the watch, and also to prove that the defendant gave it up to Nahouse, in St. Louis.

The defendant introduced Thomas Cohen and Albert Cohen, watch makers and jewellers residing in the city of St. Louis, who testified that the watch was worth from seven to eight dollars; at that time the main spring and crystal being broken, and the watch otherwise out of repair. New watches like it were worth \$15. Albert Cohen testified that he could sell such watches for seven dollars. The price of said watch at New Orleans he could not tell.

After the case was closed the court gave the following instruction to the jury:

1st. If you find from the evidence that the defendant stole the watch mentioned in the indictment from the witness Nahouse in the State of Louisiana, and brought the said watch into the county of St. Louis in this State, that the watch was of the value of ten dollars, and was the property of John Frederick Nahouse, you ought in such case to find the defendant guilty of grand larceny, and fix his punishment in the penitentiary not less than two, nor more than five years.

2d. Possession of property proven to have been stolen when such possession is recent after the theft, raises the presumption that the person in possession is the thief; but the strength of this presumption is weakened by lapse of time between the loss of the property and the finding it in the possession of another, to the giving of which instructions the defendant excepted.

The defendant asked the court to instruct the jury.

1st. If they believe from the testimony that the watch charged to have been stolen by the de-

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defendant was stolen in the city of New Orleans, in the State of Louisiana, they will find the defendant not guilty.

2d. Before they can convict the defendant upon the evidence offered on part of the State, it must appear that the defendant was guilty of larceny according to the laws of Louisiana.

3d. Before the jury can convict, the defendant must prove by the laws of Louisiana, where the offence is alleged to be committed, that said offence was made larceny by the laws of Louisiana.

4th. The possession of stolen property, unless it be recently after the larceny is committed, raises no presumption that the party in possession was the thief. If the jury therefore believe that the defendant was found in possession of the watch four months after the larceny was committed, such possession is not, in contemplation of law, a recent possession, unless the jury believe from the evidence that the value of the watch, when found in the possession of the defendant in this State, was worth ten dollars or upwards, they cannot find the defendant guilty of grand larceny. The defendant asked the court to instruct the jury as follows: There is no evidence before them that the defendant obtained the watch by larceny in the State of Louisiana—which instructions the court refused to give, and the defendant excepted. The jury returned a verdict of guilty of grand larceny, and fixed the punishment at two years imprisonment in the penitentiary.

The defendant afterwards filed his motion for a new trial, which motion the court overruled, and the defendant excepted, and appealed to this court.

A. P. FIELD, for appellant.

The first point in this case is, that the court had no jurisdiction of the offence, it having been committed in the State of Louisiana. 4 Humphrey's Rep. 456; 1 Taylor; 2 Reports (N. C.) 250; 2 Vol. United States Digest p. 107; 1 Haywood p. 100; 5 Binney's Rep. 617; 2 Johnson 479.

Second. The court had no authority to try the defendant for a crime committed in another State. If so, they could try him for treason, arson, or burglary in a foreign kingdom.

If Hemmaker, the defendant, was guilty of an offence in Louisiana amounting to felony, and fled to this State, the act of Congress in relation to fugitives from justice, requiring that he shall be surrendered to the authorities of the State from which he fled, and for the offence so committed, this State could have no power to punish him. See act of Congress, also Revised Statutes of Mo. 1845, page 535, 1st sec. and 6th, and also sec. 8, 9, 10.

Before the defendant could have been convicted under the present indictment, it was necessary for the State to have proved that he had committed larceny by the laws of the State of Louisiana. If the act of taking the watch in that State was a mere misdemeanor or trespass, then it was no offence in the defendant to bring the watch into the State of Missouri. The criminal court therefore erred in refusing to instruct the jury to that effect, as requested by the defendant.

The criminal court erred in refusing to instruct the jury that unless the watch was worth ten dollars, or upwards, at the time the same was found in his possession, in this State, he could not be found guilty of grand larceny.

The jury had no right to inquire into the value of the property at the time it was lost in the State of Louisiana. If it was an offence at all over which the court had jurisdiction, it commenced only from the time the defendant came to this State.

Judge NAPTON delivered the opinion of the court.

The principal question presented by the instruction in this case, involves the power of the legislature to enact the third section of the 9th art. of the act concerning crimes and punishments. That section

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provides "that every person who shall steal, or obtain by robbery, the property of another, in any other State or country, and shall bring the same into this State, may be convicted and punished for larceny in the same manner as if such property had been feloniously stolen or taken within this State, and in any such cases, the larceny may be charged to have been committed, and may be indicted and punished, in any county into or through which such stolen property may have been brought." The argument which denies to the legislature the power to pass such a law seems to be based upon the assumption that it is designed to execute the criminal laws of another State or country. The cases to which we have been referred arose in States, where no such legislative enactment as the above was in force. In Tennessee, in North Carolina and in New York, previous to the revision of 1830, the Courts held, that by the common law and in the absence of any statutory enactment, offences of this character committed in another State or foreign country were not cognizable in their respective courts. These opinions are based upon the doctrine in Butler's case (3 Co. Inst. 113) and upon the additional fact that the states of this union do not occupy the same relation to each other which the counties of England did. In Massachusetts a contrary decision was made in the case of the Commonwealth vs. Anderson (2 Mass. Rep. 14.) We are not under the necessity of deciding the question which these cases present. Our statute was obviously intended to punish offences committed against our criminal laws, and not those which were committed without the jurisdiction of the State. If the legislature think it expedient to declare that a person who is guilty of grand larceny in another State or country and brings within our jurisdiction the stolen goods, shall be considered as guilty of grand larceny here, it is clearly within their constitutional power to make such enactment. In the determination of the character of the offence there is no necessity for enquiring what may be larceny under the laws of the country where the offence was committed. The legislature punish the offence committed in this State by bringing the stolen property into it, and in doing so, they merely codify a settled principle of the common law applicable to different counties, and extend it here to neighboring states and foreign countries. The case of the people vs. Bush (11 Wend. 129) is an authority in point upon a statute exactly like our own.

Judgment affirmed.

LEMP vs. STREIBLEIN.

LEMP vs. STREIBLEIN.

1. A promises B (who was going to Europe for his family) that if he would bring with him A's son, (who lived at the distance of one day's travel from where the family of B resided) he would pay him one hundred dollars, and pay the expenses of his son ; B went for the boy, but his mother refused to let him leave.

Held—That B being prevented from complying with his contract by the wife of A, could maintain indebitatus assumpsit for his services in endeavoring to get the child.

2. Where the instructions given to the jury contain the law applicable to the facts of the case, and the evidence warrants the verdict of the jury, the supreme court will not set it aside.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

This was an action of indebitatus assumpsit for services and work and labor. At the trial of the cause, the first witness for the plaintiff proved that the plaintiff intended to go to Europe to bring over his family to this country, and the defendant promised the plaintiff that if the plaintiff would bring with him the defendant's son from Germany, that he the defendant would pay the plaintiff one hundred dollars for his trouble, and the expenses for his son. The plaintiff did not bring the defendant's son, although he saw him at Eschwege two or three times, the boy's mother refusing to let him leave. The distance from Cassel, the place where plaintiff's family resided, to Eschwege, was about eight hours walk. The plaintiff also offered in evidence a power of attorney from Lemp to Streiblein, authorizing the plaintiff to take the boy and fetch him to America. There was some dispute between the witnesses as to the meaning of the word *satzfer-eim*, one testifying that it meant to *fetch*, including in it the idea of *delivering*, the other that it meant "*to convey*." The power of attorney also contained an agreement to refund the expenses of bringing the boy over. The defendant's witnesses testified, that Streiblein told them that he was going to Europe for his family.

Upon the evidence, the defendant asked of the court the following instructions, to the refusal of which, and the overruling the motion for a new trial, the defendant excepts.

The jury are instructed that under the evidence introduced by the plaintiff, he is not entitled to recover in this action.

The plaintiff cannot recover in this action unless he shows that he has complied with the contract made with the defendant.

If the jury believe from the evidence that the contract between the parties to this suit was reduced to writing and signed by the defendant, the jury will find for the defendant.

If the jury believe from the evidence that the contract between the parties was, that the plaintiff should bring and deliver to the defendant, his son, then unless the plaintiff shows that he has delivered the defendant his son, or that he was prevented by the defendant from so doing, they will find for the defendant. All which instructions the court refused, and gave the following:

If the jury believe from the evidence that the defendant specially promised the plaintiff to pay the sum of one hundred dollars if the plaintiff brought and delivered to the defendant, his son, they will find for the defendant, provided the jury should believe from the evidence that the personal expenses of the plaintiff in going to Germany and returning, are not the expenses contemplated by the writing given in evidence, and this depends upon the question whether the plaintiff went specially on the defendant's business, or whether it was merely incidental to his own.

To the giving of which instruction, and the refusal of those asked by the defendant, and the overruling the motion for a new trial, the defendant excepted, and assigns the same for error.

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WHITTLESEY, for appellant.

Can the plaintiff, when a special contract has been made, the terms of which have not been complied with on his part, set that contract aside and sue in *indebitatus assumpsit* on the common counts, or must he specially declare upon his contract?

GIBSON, for appellee.

The word "*zuzufubem*," was properly translated, and was so decided by the jury in giving their verdict. The action was properly brought. The power of attorney given in evidence was not a *contract* between the parties. It was a mere power to Streiblein to go for Lemp's son and bring him from Germany here. Streiblein could not be liable to any action for not fulfilling the power.

There was conflicting evidence as to the object of Streiblein's visit to Hesse Cassell, and the jury decided that he did not go there for Lemp's son. This is evident from the amount of the verdict \$75. This small amount could have been given only for Streiblein's services in going for Lemp's son from Hesse Cassell to Eschwage, a small town about two day's journey off. A journey to Europa costs as was proved several hundred dollars. From these facts, I think it is clear that the verdict was founded on the testimony, and not on the power of attorney.

Judge BIRCH delivered the opinion of the court.

According to the statement which has been furnished in this case, the plaintiff was prevented from complying with his verbal agreement, by the interference of the defendant's wife. Assumpsit, therefore, was the proper remedy.

Upon the other point presented, although the instructions given by the court, in lieu of those refused, was rather unperspicuously drawn, it certainly did not present the case of the plaintiff in a more *favorable* point of view than was warranted by the contradictory state of the testimony—presented as above. The jury having found for him under such circumstances, to interfere with their verdict would be to run counter to the spirit of all previous decisions of this court upon similar questions. The judgment of the circuit court is therefore affirmed.

SUPREME COURT,

OCTOBER TERM, 1849.

THOMAS LEE, THOMAS MARTIN, AND JOHN FINNEY vs.
WILLIAM MOORE ET AL.

1. Where a defendant in an execution executes bond for the delivery of property on the day of sale, and fails to comply with the conditions of his bond; if the value of the property be less than the debt, the judgment against him and his securities should be for the value of the property and ten per cent. interest.
2. In such case where the value of the property is greater than the debt, the judgment should be for the debt and ten per cent. interest.
3. If part of the property be delivered, (though not a performance of the condition of the bond) whatever amount is made by the sale of it should be credited upon such judgment.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

The appellees, plaintiffs in the court below, sued out from the clerks office of the St. Louis court of common pleas five several executions against the appellants, Lee and Martin, one in favor of each of the appellees, and amounting in all to the sum of three thousand eight hundred and three dollars and fifteen cents (\$3803 15.) These five executions were all delivered to the sheriff on the same day as appears by his endorsement on each of them, and were all returnable to the February term 1849, of said court. To satisfy these five executions, the sheriff of St. Louis county levied upon certain personal property of the appellants, Lee and Martin, and advertised the same for sale according to law. The sheriff states in his return on the execution (No. 9) in favor of the appellee Dillon, one of the above named, that the property which was levied upon, and which is in the said return enumerated and described, was taken and levied upon to satisfy this and four other executions in favor of the appellees, and that it was suffered to remain in the possession of the appellants Lee and Martin, until the day of sale upon their giving bond to the appellees in double the value of the property levied upon, to wit, in the sum of seven thousand three hundred and fifty dollars with John Finney, the appellant as security, conditioned as the law directs, for the forth coming of the property levied upon as aforesaid, and every part thereof on the day of sale. There was but one bond taken, and it is made a part of the return on each execution, and specially referred to in said return. Upon the day of sale a part only of the property named in the bond was delivered to the sheriff by the appellees, which the sheriff proceeded to sell, the

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proceeds of the said sale amounting to the sum 2016 dollars and 33 cents. The sheriff's returns further state that the portion of the property levied upon and not delivered on the day of sale, was not found in his county, and no other property of the appellants Lee and Martin found in said county, and each of the said five executions was thereupon returned unsatisfied.

At the February term 1849 of the court, the appellees filed their motion for judgment on the bond against the appellants Lee, Martin and Finney, for the sum of three thousand six hundred and seventy-five dollars, (§3675) the value of the property levied upon, and ten per cent. damages, for delay, and for costs, and offered in evidence the five executions, and the sheriff's return upon each, and also the bond of the appellants. To this evidence the appellants objected, as stated in the record, and their objection being overruled, the appellants excepted to the opinion of the court.

The court then proceeded to dispose of the motion summarily under the provisions of the rev. statutes page 255, sec. 31, 32, 33, 34 and 35, and it appearing from the evidence before the court that the value of the property levied upon was less than the amount of the five several executions, and the said property not having been delivered on the day of sale according to the condition of the bond, the court rendered judgment against the appellants for the value of the said property, being the sum of three thousand six hundred and seventy-five dollars, and also for ten per cent. damages thereon, being the sum of three hundred and sixty-seven dollars and fifty cents, and also for costs, and directed the said judgment to be credited with the sum of 2016 dollars and 33 cents, the amount realised by the sale of a portion of the property as aforesaid, and the residue of the judgment to be appropriated pro rata to the payment of so much of the original debts named in the said five executions, the said sum of 2016 dollars and 33 cents having been in like manner also paid. The appellants, Lee, Martin and Finney, by their counsel excepted to the opinion of the court in giving this judgment, and filed their motion for a rehearing of said cause, for the reasons set forth in said motion, and made a part of the record, which motion was overruled by the court, and the appellants by their counsel excepted to the opinion of the court, in the overruling thereof and the case is brought to this court by appeal.

RUTLEY & RYLAND, for appellees.

The appellees insist that the judgment should be affirmed in these cases, because the court below committed no error in the rendition thereof.

No other or different judgment could have been given without conflicting with the provisions of the statutes of Mo., and overturning the great mass of decisions of the courts of other states upon statutes similar in their provisions to our own. The statute referred to is inoperative in its requirements upon the sheriff to take the bond of the defendants in execution upon their security in "double the value of the property levied upon," conditioned for its forthcoming on the day of sale, and he has no authority or power under the law to take it for more or for less than double the value. Before the sheriff could take a bond at all in conformity with the provisions of the statute he must of necessity ascertain and affix a value to the property levied upon, as he is by law the judge of the value thereof. How else could a bond be taken in any amount or at all? This valuation is invariably made in the presence of the defendant in execution, and his security, and they ratify and assent to the valuation by signing the bond, and are thereby estopped from disputing it ever afterwards.

The statement in the sheriff's return upon the execution, that the bond for the forthcoming of the property was taken in double the valuation of the property levied upon, is a sufficient statement of the value of the property, if there be any sum named in the bond, and it is unnecessary to state the value in any other way or manner, either in the bond or upon the execution. The statement in the return upon the execution, that the condition of the bond has been broken is sufficient without making any return upon the bond itself. See Barker on Planters' Bank 5 Howard Mi. Rep. page 566.

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One bond may also be taken on several executions. Winston vs. the Commonwealth 2 Call. 290.

The delivery of a part of the property on the day of sale is not a compliance with the condition of the bond. See Pleasants vs. Lewis 1 Wash. Va. Rep. 273

The failure to deliver any part of the property is a breach of the condition of the bond and the rights of the plaintiff to his remedy upon the bond attach at once, and the court is bound to hear and dispose of the motion summarily and without notice, and if the condition of the bond be found to be broken, and the execution returned unsatisfied, the return upon the execution and the bond itself is all the evidence the plaintiff need produce. The defendant must prove performance of the condition of the bond, or he cannot evade his liability. See Nicholas vs. Fletcher 1 Wash. Va. Rep. 330; Rev. Statutes page 255.

The court must then render judgment according to the following circumstances: If the property levied upon and not delivered (and by delivery is meant the delivery of the whole of the property and every part thereof) be less in value than the amount of the debt named in the execution, the judgment must be for the value of the property, and ten per cent. damages on that value and for costs. If the value of the property levied upon exceed or equal the amount of the debt, the judgment must be for the amount of the debt and ten per cent. damages thereon, and costs in both cases. As in the last named event that is to say, in all cases where the value of the property is equal to the amount of the debt, the levy in such case is a satisfaction, and the original judgment is merged in the bond which, until quashed, is a satisfaction, and the plaintiff is left to his remedy upon the bond, in addition to his remedy by statute against the sheriff, if the bond returned be insufficient. See Mitchell vs. Denbo 3 Blackford Ind. Rep. 259; Bell vs. Tombigbee Rail Road 4 Smedes & Marshall 549; Stuart vs. Fuqua Walker Mi. Reps. 175; Connell vs. Lewis Ib. 251; Sampson vs. Breed Ib. 267.

If there be any class of bonds which should be more strictly construed against the makers than all others, it should be forthcoming bonds. They operate almost invariably to the delay of justice as against the plaintiff in execution, whilst the defendant and his securities can at any and all times put an end to their liability for debt, penalty, damages and costs, by paying the execution, and compelling the sheriff to return it satisfied. To allow an obligor in such a bond to dispose of or remove a portion of the property out of the reach of the execution, and then to insist upon a reassessment of its value when it can neither be seen nor examined, and when it is not produced on the day of sale, would be establishing a principle that would be not only against good morals, but fruitful of infinite mischief and injustice.

Such a principle the court will hardly consent to establish by that which would seem to be an improper construction of the provisions of the 35th section of the act relating to executions, the phraseology of which section, although singularly awkward and ambiguous, cannot be forced to support such a construction as that contended for by the appellants in this case. This court has decided that whatever is plainly implied by the terms of a statute is just as much a part of that statute as if it were expressed in so many words. It has also been sanctioned and enforced, the principle that in all cases where we adopt the statute of a sister State, we adopt also the construction of it by the courts of the State from which it is borrowed.

The condition of forthcoming bonds cannot be broken in part and performed in part. The failure to deliver any portion whatever of the property levied upon and bonded, is a forfeiture of the bond, and the plaintiff's remedy and rights upon the bond attach at once, and no act of the obligor in such bond, or the sheriff can prejudice those rights or the remedy unless the execution be paid up and returned satisfied.

In this case the measure of damages for a breach of the condition of the bond in question, was wisely and properly settled by the court. The payment of the proceeds of the sale of that part of the property which was delivered to the several plaintiffs in execution pro rata, was an act which enured more particularly to the advantage and benefit of the security, than to any one else, and with this he should be satisfied, and ought not to ask that it should also work a

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substantial and positive injury to the appellees who in this case have been delayed in the collection of their debt by the act of the appellants.

In strict justice the appellees are not only entitled to the statutory damages for the forfeiture of the appellant's bond in the first instance, but also to other and further damages for the increased delay occasioned by this appeal.

Judge RYLAND delivered the opinion of the court.

This was a proceeding under our statute concerning executions, in order to obtain judgment on a forthcoming bond, which had been taken by the sheriff for the delivery of property levied on by him, to satisfy the five executions in favor of the appellees separately, as mentioned in the appellees statement of the case as above.

This proceeding is founded on the following sections of the said act:

SEC. 31. When the sheriff or other officer charged with the service of an execution shall levy it upon personal property, the defendant may retain possession thereof until the day of sale, by giving bond in favor of the plaintiff with sufficient security to be approved by the officer, in double the value of such property, conditioned for the delivery of the property to the office, at the time and place of sale to be named in such condition.

SEC. 34. If the condition of the bond shall be broken and the execution returned unsatisfied, the defendant and the sureties shall be deemed to have notice of the facts, and the plaintiff, without further notice, may, on the first or any subsequent day of the return term of the execution, move the court for judgment on the bond against the defendant and his sureties, or any of them, as the plaintiff may at his option bring suit on the bond.

SEC. 35. If any controversy arise on the motion, it shall be heard and determined in a summary way, without the form of pleading, and, unless the demand be avoided, a judgment shall be rendered thereon without delay, according to the circumstances, as follows: "If the value of the property so levied on, and not delivered at the day of sale, be less than such amount, the judgment shall be for the value of the property so not delivered, with ten per cent. damages for the delay and costs in both cases."

In this case the amount of the value of the property levied on, as appears from the bond taken by sheriff is less than the amount of the judgment in which executions had issued, and had been levied—that is, the value of the property was less than the debt.

It was then right of the plaintiff under this statute to have judgment

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for the amount of the value of the property levied on with ten per cent. damages thereon—that value being less than the debt. Had the value of the property levied on been more than the debt, the judgment would have been for the amount of the debt only, with ten per cent. damages.

A delivery of a part of the property levied on is not a performance of the condition of the bond. The plaintiff may still have his motion and judgment and damages; but whatever amount shall have been made by the sheriff upon a sale of the delivered property, shall be credited on the judgment.

We see no error in the judgment of the court below, and its judgment is affirmed.

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Confessions of a defendant, to an officer having charge of him, induced by the officer telling him that "he would not appear against him in court if he would confess and tell him all about the act," that "he had better confess and could give state's evidence" are not admissible in evidence against him.

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SHARP for appellant.

1st. When a confession is made by a defendant it must appear that the confession was made free and voluntary; and that any confession or admission of guilt, or any fact which may tend to the proof of it, made by the defendant under inducements held out to him to produce a confession, whether those inducements are of a character to create hope in the mind of the defendant that he may by making such confession escape temporal punishment, or of a different character and calculated to produce fear in the mind of the defendant; the confessions so made are inadmissible evidence. Arch. Cr. Ev. 109, 110; Roscoe Cr. Ev. 29, 30, 31, 32; 1st Leach, 263; 6th Wend. 568.

2d. That confessions made upon inducements, such as "it is better to tell me all about the matter, and I will not appear against you, and you can give state's evidence in the case if others have not," or any other similar inducement which leads the party to an involuntary confession or admission, is improper evidence to be admitted in a criminal cause. Arch. Crim. Pl. 109 to 112; 2d Hale, 285; 2d East. P. C. 659; Reg. vs. Drew; 8th C. & P. 140; 5th C.

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& P. 518; lb. 290; R. vs. Partridge, 7th, 6th, P. S. sec. 1; R. vs. Jones, R. & R. 152; 2d Stark. Ev. R. vs. Bailey, 23.

3d. Confessions made to other persons than the officer interested in the arrest or apprehension of the defendant, such a confession is presumed to be under the influence of such inducements, and should not be received. That in this case the confessions made to young Nesbit, son of the Banker who was robbed, and who was at the time in Cincinnati in quest of the defendant, and who was in company with the officer who presented the inducements spoken of in the evidence, and on board as a passenger in same boat at the time the confessions were made, which should have been excluded from the jury: 2d. East. P. C. 658; 1st Philip Ev. 104; Arch. Crim. Pl. 112.

4th. The court erred in giving the instructions to the jury as contained in the record; 1st, because they were calculated to mislead the jury, and 2d, because they are not the law; a bare inspection of them is sufficient.

5th. The court erred in refusing the instructions asked for by defendant. 1st. Because they are the laws, and 2d. because they were necessary to instruct the jury as to the proper weight and importance to give to confessions made under such circumstances, and while these bare confessions were the only evidence of defendant's guilt. See instructions.

6th. That the court committed error in refusing defendant a new trial upon the suggestion of defendant's counsel and the several affidavits filed, although the time for filing a motion for a new trial had past. 5th Mo. Rep. 323.

LACKLAND for the State.

There was not such an inducement as to make the confession inadmissible. Because it is not such an inducement as was calculated to make the confession of defendant an untrue one, which is the test. Whorton Com. Law, p. 186; Archbolds C. P. 9 Ed. 110.

Micheau does not appear by the record to have been an officer or one in authority, but that he officiously, without any kind of authority, promised, and promised without the means of performance. In like cases is the confession admissible. Whorton Cr. L. 185; 8 C. & P. 733, top paging, 608; 7 C. & P. 776.

Where a witness said to defendant that he might say what he had to say to him, for it should go no further, a statement thereupon made by the defendant was held admissible. Whorton Cr. L. 186; Rex vs. Thomas, 7 C. & P. 345, top paging, 536.

A promise to be a sufficient inducement must be a positive (and not a conditional) promise of some benefit in the power of the promisor to perform, and that the promise must have been calculated to urge the defendant to make an untrue confession.

The promise in this case was insufficient to make the confession of defendant inadmissible.

1st. Because it was a conditional promise, the performance of which conditions was beyond the power of the promisor, and this the law presumes was within the knowledge of defendant.

2d. Because no benefit could have resulted to the defendant if the witness, Micheau, had kept his promise and had refused to be sworn, and had never said any thing about the confession. The defendant then would have been in precisely the same condition as he was before he confessed to Micheau. The confession, therefore, could not have been induced by the hope of benefit.

The latter portion of what is contended to be a promise states, "that he might turn state's evidence if none of the others had done, and thereby get clear." This, it is contended, does not amount to a promise at all on the part of Micheau of any thing.

The court did not err in refusing to grant a new trial on account of newly discovered evidence. Because the affidavit is insufficient. It should set forth the name of the witness, the

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matter he can swear to, the matter of new testimony is not set forth in the affidavit, &c.; Graham Prac. 631; Graham p. 463.

The court did not err in refusing the instructions asked by defendant's counsel, because they all were either bad law or contained in the instructions given by the court.

Court did not err in refusing the first five and seventh instructions asked for by defendant's counsel, because said instructions make it incumbent upon the jury to decide the competency of the instructions, which is a question to be decided by the court. Hector vs. State, 2 Mo. 135; Whorton's Crim. Law, p. 188.

The court did not err in refusing to give the sixth instruction asked for by defendant's counsel, which is as follows: "That it is incumbent on the State to prove the actual stealing, taking or carrying away of the goods, or the possession of such stolen goods unaccounted for by defendant, and that in the absence of such proof the jury should acquit." This instruction is wrong in this, that it goes upon the principle that no one can be guilty of larceny except he actually carry off the property himself by his own physical strength, or that the property be found in his possession and he fail to account for the possession. This is not the law, because he could be guilty of larceny without the existence of any of the facts mentioned in said instruction. A party may be guilty of larceny without the stolen property having been taken away by the hands of the accused. Roscoe Cr. Evid. p. 469.

The court did not err in refusing the 8th and last instructions asked by defendant's counsel. Because said instruction declares that defendant could not be guilty of burglary, unless he actually assisted in breaking the house, &c. Roscoe Evid. p. 258; Ibid. 259.

Judge RYLAND delivered the opinion of the court.

The indictment in this case contained two counts; the first for burglary and the second for grand larceny. The defendant was found guilty on both counts, and sentenced to imprisonment on the first count for ten years, and on the second for five years.

On the trial the burglary was proved by R. N. Nesbitt, the person whose house had been robbed. The State also introduced as witnesses S. Micheaux, the officer who arrested the prisoner, and B. Nesbit, a son of the prosecutor. Their testimony was as follows:

"The first time I saw defendant was in Cincinnati, Ohio; went there after him and others; had a warrant; saw young Nesbit (Benjamin) there; found the defendant in jail there. I brought him to St. Louis; found nothing on his person. I know the house that was robbed, and saw it after the entrances had been made in it; a door opened from the side into the base of the building where the vault was; the vault had been cut through; saw an axe and crow bar there; saw some powder; the marks of it where it had been burnt. I have conversed with the prisoner. I told him to tell me all about the matter, as I would say nothing about it. My object in telling him this was not to get the money but to catch the other parties. The prisoner told me he was there on the night of the robbery at the house of Nesbitt & Co.; he told me three others that were there; he said he did not know any of them by

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name, but from my description of them he said they were the persons; he told me that those I described were the principal actors; that he, defendant, did not go into the house, but stood on the outside and kept a look out; he said he met those men who were with him at the robbery on the river; they induced him to St. Louis. After the money was taken they took it to the northern part of the city and divided it after daylight; they got through the robbery in the morning before day light; had some difficulty in removing one bag of money; it was divided among them; some of the money was worthless; he said it was his first offence; that he was a pilot on a steam boat."—Cross examined by defendant.—"This conversation was on board the steam boat in the state room, and shortly after leaving Cincinnati, and between that place and Louisville the prisoner was ironed with hobbles by myself.

"I had no conversation with defendant in the jail at Cincinnati, Ohio; young Nesbit and the city marshall went with me to see defendant in the jail there; they left at the same time I did. I had many conversations with defendant on way from Cincinnati; do not recollect that defendant told me the amount of money which he got, but said it was less than what the others had. I promised the defendant that I would not appear against him in court if he would confess and tell me all about the act, as my object was to catch them. I told him that it would be better for him to tell me all about it, and that I would give him my honor as a man that I would not appear against him in court unless compelled to, and that he could give state's evidence if none of the other boys had confessed it; that they had none done so before I left St. Louis. I told him that if I was called I would object to being sworn, as I would not swear against him. I presented inducements to the prisoner to confess before he told any thing of the facts. I told him in these words, that the better plan for him was to tell me all about it, as I would not appear against him, or words to that effect, as it was my object to catch the other offenders. I am confident that I commenced the conversation about the matter first, and brought out the confessions by inducements held out to him. I told him that he could turn state's evidence and get clear, if the others had not already told it. He then told me all about it and what he did."

Ben. Nesbit being sworn, says: "I know the defendant; have seen him before; the first time I saw him was in the jail at Cincinnati, Ohio. I know that the banking house of William Nesbit and Robert N. Nesbit was robbed on the night between the 22d and 23rd March last; the house was situated on the north east corner of Main and Olive streets, in the

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county of St. Louis, in the State of Missouri. This is the banking house that was robbed at the time above stated. I was a teller in the banking house, and received and paid out money on the evening prior to the night of the robbery. I deposited the money and checks received during the day in the vault, which was situated in the basement of the house. I locked the door of the vault, and no one was in there after I was and before the robbery; when I locked the door of the vault on the evening prior to the robbery it contained between \$20,000 and \$30,000 in silver, gold, bank notes and checks, as follows: \$5,000 in silver, \$2,000 in gold, and about \$20,000 in bank notes and checks. There were a number of bank notes and coins of the same denomination and description, and of the same value as mentioned in the indictment in this cause. The bank notes and coins were all of the property of Robert and William Nesbit; on the first morning after *robbery* all this money was gone out of the vault and no money at all could be found, except a few silver dollars which lay scattered over the floor. I saw the banking house next morning; it had been entered through an opening made in the outer wall of the building which let the robbers into the part of the building occupied by the Insurance Company: a door was then forced which led into the portion of the building used by Rob. & Wm. Nesbit as the banking house; the floor was then cut which enabled the robbers to get into the basement story; the back or eastern end of the vault was opened; it was an iron vault surrounded by a brick case laid in mortar. There was a hole cut through the bricks and iron large enough to admit a man; appearances showed that the vault door had been attempted to be forced; a corner of was twisted. Also saw powder there; and saw where the door of the vault was blackened near the key hole, as if they had attempted to blow the lock with powder. I left my coat hanging in the banking house on the evening prior to the robbery; next morning found it in the basement with a sleeve cut off. Shortly after the robbery I went to Cincinnati, Ohio, where I found Connerly in jail; Messrs. Goodman & Co. paid me over about \$2,500 as money taken from Connerly. I don't know of my own knowledge that the money was taken from Connerly. Some of this money which I received from Messrs. Goodman of Cincinnati, (they were the agents of Rob. & Wm. Nesbit in Cincinnati, Ohio,) I knew was in the vault of Rob. & Wm. Nesbit on the evening previous to the night of the robbery. Here are two pieces of South Car. gold, called half eagles, each of the value of about \$4 80; also a bank note on the bank of Virginia of the denomination of fifty dollars; also a bank note of Ohio of the denomination of twenty dollars.

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The two gold coins and bank notes were in the vault of Rob. & Wm. Nesbit on the evening prior to the night of the robbery, and the next time I saw them was when they were paid over to me by Messrs. Goodman of Cincinnati. They also gave me the sleeve of my coat, the body of which was left in the banking house. After I left Cincinnati with the money, in company of officer Micheau and defendant, on the boat we conversed frequently; defendant told me that he was present at the banking house of Rob. & Wm. Nesbit at the time it was robbed; that he was in the passage (being the portion of the house leading to the office of Ins. Co.;) staid there about fifteen minutes; he then went out to keep guard; he would give signals when any one approached that those in the house might cease making a noise; they commenced about 10 o'clock and left the banking house just before day light; he helped to carry the money. They took the money to their room on Franklin avenue and divided it; his share \$3,000. There were four others engaged with him; the names of the men I did not know; first saw them in the lower Mississippi river, and they prevailed on him to come to St. Louis; he is a steam boat pilot. The rest swindled him a little; a part of the money he got was not good. This conversation was entirely voluntary on the part of the defendant when he and myself were alone. He told me this on the boat several times. I never held out any inducements whatever to get him to tell me any thing about it; he would commence the conversation himself."

No objections were made to the competency of these witnesses or to the competency of their evidence; but before the case was submitted to the jury, the court was asked to give the following instructions:

"1. If the jury believe from the evidence that the confessions made by defendant, made to the officer and other persons having defendant in custody, were made by inducements held out to the defendant, or promises which operated upon the mind of the defendant in hope of escaping punishment, or any other inducement amounting to threats, fears or promises, and that from such inducements the defendant made his several confessions, they should disregard them.

"2. That before any confession can be received as evidence in a criminal case, it must be shown that it was voluntarily made, and that if the confessions drawn from defendant were by the use of the flattery of hope, or by the torture of fear, or by such promises held out to the defendant that rendered his said confessions involuntary, then the jury should reject such confessions.

"3d. That if the defendant was made to believe that a confession of

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the whole matter connected with the robbery should not be used to his prejudice in a court of justice, but that the confession would better his prospects for escaping punishment, though it was at the same time told him the object of those getting the confession was to catch other offenders, and not to be used against him, this is such an inducement as should warrant a jury in excluding the evidence in rendering a verdict in the cause.

"5th. That if the confessions made to one of the witnesses was the same as that made to the person who presented inducements to defendant, and after the first confession made in answer to such inducements, it should be regarded as the confession made in the first instance."

These instructions were refused, and the court instructed the jury as follows :

"If the jury believe from the evidence that the defendant, in the county of St. Louis, and within three years before the finding of the indictment, did break into and enter in the night time, or that the defendant did aid and assist any other person or persons, by keeping watch or in any other way, while they did break and enter in the night time the banking house of Wm. Nesbit and Robert Nesbit, in which there was at the time any money kept or deposited, and that the defendant did so break and enter, or assisted any other person or persons in so breaking and entering, for the purpose and with the intent to steal as charged in the indictment, you will find the defendant guilty under the first count in the indictment.

"If the jury find the defendant guilty as charged in the first count of the indictment, and also find that the defendant did commit larceny, that is, did steal, take and carry away, or assisted any other person or persons in stealing, taking and carrying away any bank bills, or gold, or silver coin belonging to William Nesbit and Robert N. Nesbit, as charged in the indictment, for the purpose of converting the same to his own use and profit, and of any value whatever, you will find the defendant guilty under the second count of the indictment.

"If the jury find the defendant guilty under the first or second, or both counts in the indictment, they will assess the punishment by imprisonment in the penitentiary, under the first count, for a term not less than five nor more than ten years, and under the second count for a term not less than two nor more than five years.

"If the jury find the defendant guilty under one or both counts in the indictment, they will set forth in their verdict under which of the counts

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they find the defendant guilty, and if they find him guilty under both counts they will say so in their verdict.

"To find the defendant guilty it is not necessary for the defendant actually to have broken any part of the house, or actually to have entered the banking house alleged to have been broken and entered; but if the defendant was then and there present, and did any thing towards the completion of the common design to commit the robbery mentioned in said indictment, by watching on the outside of said house or otherwise, you ought to find him guilty on the first count.

"Voluntary confessions made by the prisoner are to be taken against the party making them, for the law presumes that no person will make a confession of crime when there is any probability of escape. But the confession must be made voluntarily; that is, not extorted from the party by force nor induced from him by promises from a person authorised to hold such inducements. The words that "It is better for you to confess," or "better for you in the long run to tell the whole truth," or "better for you to tell all about it, for you can turn state's evidence," are not words of sufficient inducement to warrant the jury to disregard confessions made under such circumstances.

"If the jury have a reasonable doubt of the guilt of the accused they must acquit."

It would have been more regular for the defendant to have made his objections to the competency and admissibility of the confession to the court, before the confessions were detailed in the hearing of the jury, and got the judgment of the court on the confession as to their being proper evidence or not to go before the jury. This course is the safest and best, and is the one required by the practice of the courts and the weight of authority on the subject. It can easily be effected by requiring the jury to be withdrawn to their room under the care of the sheriff, whilst the court is engaged in examining the manner and mode and circumstances under which the confessions were made. The court then declares whether the confessions be such as should be made evidence before the jury; and the defendant has an opportunity of objecting and excepting to the opinion of the court, and thus saving that point for the supervision of the court.

But in this case this course was not pursued: the defendant brought the competency of the confessions directly before the jury by asking the instructions. The court refused the instructions then asked, and then proceeded to give instructions of its own accord.

We entertain no doubt that the law is as declared in the defendant's

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1, 2, 3 and 5 instructions above set forth ; and had the court in its examination, which ought to have been made into the manner in which these confessions were obtained, been called on to declare the law to be as laid down in these instructions, its refusal to declare it thus would be considered as error. We feel inclined to declare that such refusal is still error in the mode pursued by the prisoner's counsel and the court in relation to the confessions on this trial. We entertain no doubt from the statement of the witness, Micheau, that the confessions were extracted from the prisoner under inducements which are sufficient in law to exclude the idea of such confessions being voluntary. The prisoner was in the custody of the witness: witness had been sent for the prisoner to the State of Ohio : found the prisoner in jail in Cincinnati: witness took prisoner on board a steam boat, put iron hobbles on the prisoner, then commenced the conversation with him by which he extracted the confessions. Witness said to prisoner, "that he would not appear against him in court if he would confess and tell me all about the act;" "it would be better for him to tell me all about it." "He had better confess and could give state's evidence, unless some of the others should do so first, and none of them had so done when he left St. Louis." This testimony should have been excluded from the jury at first; and the jury should have been instructed to disregard it, even after it had been given to them.

We consider the last instruction given by the court to the jury also, as incorrect. For an officer, in whose custody the prisoner is, to say to the prisoner he had better confess, "or better tell me all about it," "or better plan would be to tell all about it," has been uniformly held as sufficient inducement to the prisoner to render any confession, thereupon made inadmissible in evidence. We are compelled in this case to view the witness, Micheau, in no other light than as an officer. This case is not like the one of "Hawkins vs. The State." That case was tried before one of the judges of this court when on the circuit bench, and the remark made there to the prisoner by a Mr. King, a private person, the neighbor of the prisoner, and who said to Mrs. Hawkins, the prisoner, "that it would be better in the long run to tell the truth, or tell all about it," was made sometime before the confession was given by Mrs. Hawkins. She had time to think and reflect; no temporal consideration was offered to the mind.

We do not feel inclined to reverse this case for the court's refusal to give the instructions prayed for by the defendant; and if that was the only error we might pass over it. But as the court undertook to give

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instructions of its own accord to the jury, such instructions should have declared the law properly ; and we cannot assent to the law as laid down in the last instruction given to the jury by the court.

The judgment of the criminal court is, therefore, reversed ; and this cause is remanded for further proceedings not inconsistent with this opinion.

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A circuit court, or judge thereof in vacation, has authority to issue a writ of "*habeas corpus*," for a person confined upon an indictment found in another court of competent jurisdiction ; and if such court or judge should order such person to be discharged, the jailor having custody of him, is justified in obeying the order, however erroneous and illegal it may be.

APPEAL FROM ST. LOUIS CRIMINAL COURT.

FIELD & HALL, for appellant.

The first point in this case that the appellant was guilty of no contempt of the criminal court, by wilful disobedience of any process or order lawfully issued, by said court. Revised Statutes page 338 Sec. 61.

2d. The circuit court had jurisdiction of the case as presented by the return of the appellant, and therefore had full power and authority to discharge said Jackson from the custody of said appellant. 1st and 2d sections of habeas corpus act, page 555, 556.

3d. The writ of habeas corpus issued by a court or judge, having by law the authority to issue the same, cannot be disobeyed. 12th section 1 art. habeas corpus act, p. 557, page 569, sec. 12.

4th. No order, process, or writ, from the criminal court, would be any justification on the part of the jailor, in refusing to obey said writ. 10th section of the habeas corpus act, page 560.

5th. Jackson, after being brought before the circuit court, upon said writ of habeas corpus, and the cause of his imprisonment returned by the appellant, was in custody and under the control of the court, and not the appellant, and the order discharging him could not be disobeyed. Page 552 sec. 5 habeas corpus act.

6th. The officer obeying an order discharging a prisoner from his custody is not liable, either in a civil action or for contempt of court. Page 566 of revised laws sec 24.

LACKLAND, circuit attorney, for appellee.

The principle seems to have been settled by this court, in the case of George vs. Murphy, 1

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Mo. Rep. 558, in this wise: a judgment of partition was rendered by the circuit court under our statute concerning partition. Commissioners were appointed, who made partition, and made report to the court of their proceedings. The circuit court set aside the report, and proceeded to make partition without the intervention of commissioners. This court decided that the partition made by the circuit court was a nullity, because the statute gave no such power to the court. Much more must the act of judge Hamilton be a nullity, when the section of habeas corpus act above referred to, expressly forbids such discharge, and virtually says that as to a party imprisoned on an indictment or process, to enforce the same it shall be as though there was no habeas corpus act at all.

In all other counties in this State except this, the sheriff is jailor. By a special act, the jailor of this county is made an independent officer. In respect to the duties of his office, he may be considered as a sheriff, because as to the duties of his office, he stands in the same relationship to the court as the sheriff of other counties.

The sheriff or other officer executing the orders of the court, is bound to know whether the court has jurisdiction of the matter, or whether the acts of the court are utterly void for want of jurisdiction, because upon this turns the question whether the officer, in executing these orders, is a legal agent of the court, or a mere trespasser. In support of this point—vide Sewell on sheriff 44 vol. law library p. 92; 8 T. R. p. 432; Watson on sheriff p. 29; 5 Coke Rep. p. 76.

If the order of judge Hamilton were a nullity, then the jailor was without authority, and a wrong done in executing it, and he having executed it in disregard of a legal order made by the criminal court, a court having jurisdiction of the matter, was guilty of a contempt, and the criminal court had a right to sue Martin for such contempt. Sec. 61 & 62 act to establish courts of record and prescribe their duties.

Supposing the indictment had lost its vitality by lapse of terms, even then we contend the circuit court not the judge thereof, had no authority to discharge, for want of jurisdiction.

1st. Because the habeas corpus act merely gives the court or judge the power to inquire into the cause of detention and imprisonment when the charge for which he stands committed has not ripened into an indictment, and throughout its whole spirit conveys the idea that after an indictment be found habeas corpus cannot aid the party, because by that writ neither the vitality nor validity of an indictment can be inquired into. And if his honor judge Hamilton, or the circuit court, could go behind so grave a matter, and inquire into its vitality as above specified, he could also inquire into its validity, and say whether a motion to quash, or a demurrer would lay and sustain, or overrule them as he might think the case required, which we hold to be the exclusive province of the criminal court; and if judge Hamilton or the circuit court could do this, so could judge Blair, and the court of common pleas, and also the county court, and the seven justices which compose the same, and the result of this construction of the act would be, that we would have as many criminal courts in this county as we have officers and courts in this county authorized to determine matters on habeas corpus.

2d. The circuit court had no jurisdiction to discharge Jackson under the law, because it would in effect be admitting that the circuit court had jurisdiction of a criminal cause, and could render a judgment therein. It cannot be supposed that judge Hamilton, or the circuit court, brought Jackson out on habeas corpus to discharge him on bail, because he was discharged without bail, and we are forced to the conclusion that he was brought out for that purpose (i e) to be discharged without bail, for which he had no jurisdiction or power to issue the writ of habeas corpus. The circuit court rendered its judgment discharging Jackson under certain supposed rights, that by virtue of the 25th sec. 6th art. of Prac. and Pro., in criminal cases were extended to Jackson. This judgment of discharge is an absolute nullity, because the circuit court had no jurisdiction. 1st. For the reason, that if Jackson had rights by virtue of the section of the act above mentioned, these rights could in no wise be enforced by habeas corpus, but must be by motion to discharge in the criminal court where the indictment is pending, which construction is abundantly strengthened by the 26, 27, and 28 sect. of same acts which are in relation to matters in the same

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connection, which can only be performed by the criminal court. The right to be discharged under said 25th sec. often depending upon matters which must be judicially known, and can only be judicially known to the court having criminal jurisdiction, and in which the cause is pending, and must be obtained through the instrumentality of the criminal court: and secondly, for the reason that a discharge under said 25th sec. is not merely a restoration of personal liberty—or the rights of locomotion, which is the only use and object of the habeas corpus act, but it is a *discharge "so far as relates to the offence for which he was committed"*—a discharge of the *offence*. It seems plain that when a party is discharged properly under the provisions of the 25th sec. above referred to, that the offence for which he stands charged by operation of law, becomes *res adjudicata*, and that discharge could be plead in bar of any indictment subsequently found for the same offence. The circuit court undertakes to determine his right to a discharge, and to render a judgment of discharge in the matter—to make the matter *res adjudicata*, to render judgment in a criminal cause then pending in another court, to wit, the criminal court; and that court having "all the original and appellate jurisdiction in criminal cases vested in the several circuit courts of the State." Sec. 1, act to establish criminal courts. So far then as original and appellate jurisdiction in criminal cases is concerned, the criminal court is the circuit court in this county, and the circuit court as to these matters, is no court at all. The 5th sec. of the act last mentioned says: "The circuit court of St. Louis county shall exercise its superintending control over the said criminal court only by appeal or writ of error allowed and prosecuted in the manner and with the effect prescribed by law in cases of appeals or writs of error to the supreme court," &c. These, then, are the only means known to the law, by which the St. Louis circuit court can have any thing to do with a criminal cause. The cause of Jackson was not brought before the circuit court in any of the ways authorized by the law, and in fact it attempts to try a criminal cause by habeas corpus and render a judgment therein, which we think may be regarded as an anomaly in the law. Is it not clear that such a judgment is a perfect nullity, and the process issued thereon no shield to the officer executing the same.

It is contended by the circuit court that the indictment ceased to exist by virtue of the lapse of the second term after indictment, that it was *void*, and not *voidable*, and by operation of law as to Jackson, it was as though there was no indictment pending against him, and consequently that there was no cause for the detention of Jackson. In answer we say, first: That the circuit court had no power to inquire into the vitality or validity of the indictment, by *habeas corpus*, but as soon as it appeared to the court that there was an indictment against Jackson, he should have been remanded or admitted to bail—any other act disposing of or affecting the matter is utterly void, no only because it is simply without authority of law, but right in the face of statutory enactment.

Secondly. The end of the second term after indictment found had not come when Jackson was discharged, allowing that the lapse of terms made the indictment a nullity, because the end of November term 1848 of the criminal court had not then come, which was the *first*, and not the *second term after* indictment found.

Thirdly. Admitting that the end of a dozen terms after indictment found had come, this does not make the indictment void, and cause its legal death, but by the lapsing of these terms, certain rights accrue to defendant under the said 25th sect., which he may avail himself of, or not, agreeably to his pleasure, and which do not go to the vitality of the indictment at all, but are like any other matters of limitation; for if any number of terms, after indictment found had elapsed, and the defendant failed to apply for his rights under the 25th sec., and a conviction had on such an indictment, that conviction, it is contended, would be as valid as any ever obtained in any court. But the 25th sec. says "*he shall be entitled to be discharged*," evidently leaving it optional with the party to make his motion in the criminal court, and go out of court in that way, or to stand a trial and be honorably acquitted by a jury of his country, often a matter of the most importance, and often dearest interest to the party; but according to the construction given by the circuit court, he would be bound to be released by force of the limitation only, without any power on his part to

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spurn such relief, and to avail himself of the right to clear up a charge made against him of however grave a nature, and unfounded it may be.

The criminal court ordered Martin to retain Jackson to answer to an indictment then pending against him in that court, which order was made some time after Jackson had been committed by the criminal court, and Martin was at the same time admonished not to discharge Jackson on the order or process of any other court, because no other court could make such order, for want of jurisdiction.

The order made by the criminal court requiring Martin to keep Jackson; and him safely, keep to answer unto the indictment then pending in said court against him, was a lawful order, and which order Martin knowingly, and consequently wilfully disobeyed, and which agreeably to the 61st and 62d secs. of the act to establish courts, above referred to, is a contempt, and the criminal court had the right to fine him for the same.

Judge RYLAND delivered the opinion of the court.

From the facts, as stated in this case, and as they appear from the record, the main question for the court to decide is, had the circuit court of St. Louis county, or the judge thereof, in vacation, the power and authority to issue a writ of habeas corpus on the petition of the prisoner John Jackson? If this question be answered in the affirmative, then no matter how indiscretely or how erroneously the said circuit court, or judge thereof, may have acted in discharging the prisoner Jackson, nevertheless such discharge will be a full and complete justification to the ministerial officer or jailor in obeying it.

Our statute upon the subject of habeas corpus, secs. 1 and 2 article 1st declares, that "every person committed, detained, confined, or restrained of his liberty, within this State for any criminal matter or under any pretence whatsoever, except, when according to the provisions of this act, such person can neither be discharged or bailed, or otherwise relieved, may prosecute a writ of habeas corpus as hereinafter provided, to inquire into the cause of such confinement or restraint."

SEC. 2. Application for such suit shall be made by petition, signed by the party for whose relief it is intended, or by some person in his behalf, to some court of record in term, or to the (a) judge of the supreme court, or circuit court, or any justice of the county court." By this statute, power to grant or issue writs of habeas corpus is expressly given to the circuit court or to a judge thereof. This power is given with this restriction—see the exception in the first section of the act above recited—"except when according to the provisions of this act, such person can neither be discharged or bailed or otherwise relieved." The prisoner John Jackson was indicted in the Saint Louis criminal court, for an offence which by our law is bailable, and was in confine-

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ment under process upon said indictment. Could the circuit court of St. Louis county, or the judge thereof, in vacation admit the prisoner to bail? See Revised Statutes 1844-5, practice and proceedings in criminal case art. IV secs. 19, 20, 21.

SEC. 19. "Where the indictment is for a bailable offence, the defendant may be let to bail by the court in which such indictment is pending, or if such court be not setting, by the judge thereof, or by any judge or justice of the county court of the county in which such indictment is pending.

SEC. 20. When the indictment is for a misdemeanor the sheriff may himself admit to bail, the defendant with sufficient security, in a sum proportioned to the offence, and which in no case shall be less than one hundred dollars, and the recognizance shall be signed by the prisoner and his securities, and attested by the sheriff.

SEC. 21. No court or officer, other than those specified in the two last sections, shall let to bail any person indicted for an offence."

Do the words "any judge or justice of the county court" in the 19th section mean the same officer? Without giving any opinion as to the power of the St. Louis circuit court or the judge thereof in vacation to let to bail a prisoner confined upon indictment, found by another court of competent authority; the prisoner Jackson may have been entitled to some other relief. At any rate the St. Louis circuit court and the judge thereof in vacation had the power to grant and issue the writ. This gives to such court or judge jurisdiction over the subject matter; and though the statute expressly declares that "no person imprisoned on an indictment found in any court of competent jurisdiction, or by virtue of any process or any commitment to enforce such indictment can be discharged under the provisions of this act; but may be let to bail if the offence be bailable, and if the offence be not bailable, he shall be remanded forthwith." See habeas corpus act art. III sect. 12. Yet this section does not take away the jurisdiction, but orders and directs what shall be done. A circuit judge, therefore, discharging against this provision of the statute, may be considered as acting indiscretely, even erroneously; yet having jurisdiction over the subject, his order discharging, must be considered a justification to the jailor in turning out the prisoner, thus ordered to be discharged. The rule is, if the court have jurisdiction over the subject matter, the sheriff must obey the writ. See 1st vol. Missouri Rep. 418, Berry and Smith vs. Burckhart; Sewell's law of sheriff, Law Library vol. 44 p. 92.

When the court hath jurisdiction of the cause, and shall proceed

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“*in verso ordine*” or erroneously, there the officer or minister of the court, which shall execute the precept or process of the court, is excusable so as no action will be against him; but when the court hath no jurisdiction of the cause, then all the proceeding is “*coram non judice*,” and therefore an action will lie against the officer without any regard had of the precept or process of the court.

The distinction taken between the *erroneous judgment* of a court having jurisdiction and the *want* of jurisdiction, is thus illustrated by Dalton: “If the justices of the peace arraign a person of treason in the session who is convicted and executed; this is felony as well in the justices as in the sheriff or officer who executed the sentence, but if he had been indicted of a trespass, found guilty and hanged, though this had been felony in the justices, yet it would not be so in the sheriff, because, a matter in which they, the justices, had jurisdiction, and in which *they only* were to blame in exceeding their authority.”

The circuit judge here having authority to issue the writ of habeas corpus, (and this point the attorney for the State in his brief admits, but contends that all the subsequent acts of the judge are not only against but are beyond his jurisdiction, and are utterly void,) his act afterwards in discharging the prisoner John Jackson, although it may have been erroneous and contrary to law, yet it could not be said to be an act “*coram non judice*.” There is a broad and obvious distinction between the illegal judgment of a court having jurisdiction and the act of a court without jurisdiction—and the authority from Dalton I consider sufficiently discriminating.

The defendant Martin must be considered as justified in obeying the order of the circuit judge; and from the answer of the said Martin to the rule of the criminal court against him, it appears that he only acted in obedience to the order of the circuit judge, without any intent or design to disobey the order of the criminal court.

I feel bound to state, that in my opinion, the defendant Martin purges all contempt, and that he should have been discharged without fine. In the matter of the fine then my opinion is, the criminal court erred, and such being the opinion of my brother judges, its judgment is reversed.

STEAM BOAT MARY BLANE vs. FRANCIS BEEHLER.

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1. Where a person furnishes a boat with articles, under a special contract, and delivers them on different days, the lien attaches upon the delivery of the first articles.
2. In computing the time within which suit against a boat or stores should be commenced, the day on which the delivery was completed should be excluded.

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RANNELLS for appellant.

The time given by statute is for six months and no more. It begins to run from the moment of time when the goods are delivered. 9 Mo. 654, *Darby vs. St. Bt. Inda*.

In this case, as to the goods delivered on the 14th Dec. 1847, the statute began to run on that day, and the time expired prior to the day the suit was brought. No agreement of the parties for credit can extend the time, nor can any arrangement between them as to the manner and times when the goods are to be furnished, change the time of the commencement of the lien, nor prolong its duration. It is fixed by law. Same case, and Rev. Code of '45—title Boats and Vessels.

The contract (so called) is not entirely in the sense the appellee's counsel contends, nor can such a contract be made. Otherwise by an agreement to furnish all the goods a boat may want during a season or a year, a lien may be continued for a year and six months.

As to the goods furnished on the 22d Dec., 1847, the lien had expired before suit brought; the day on which the goods are furnished should be included in the computation of the time that the lien continues. The lien commences with and from the very moment of the delivery of the goods ; it exists continuously from that moment ; suit may be brought upon it that very day. The law knows no division of a day.

When a per cent. interest is to commence from the date, the day of the date is included in the computation of time. 4 Wash. C. C. Rep. 240; 15 Sergt. & Raw. 136.

When the computation is to be made from *an act done*, the day on which it is performed is included : because the act is the terminus a quo the computation is to be made. 4 Wash. C. C. R. 240; Brown Pa. R. 18, 9th C. 119; 3rd T. R. 623; Doug. 446; 1 Ld. Ray, 280; 3 East. 152; *Rix vs. Adderly*, Doug. 464; 3d N. H. Rep. 94; 4th Ib. 270; 9th Ib. 307.

In construing the statute of limitations the day on which the cause of action accrues is included. 15 Mass. Rep. 193; 3 G. & John. 395; Indell. Dig. N. C. R. 2, 649.

When the term month is used in a statute, it means a lunar month or 28 days, unless otherwise expressed. 4 Wendell, 512; 15 John. 120; *L. vs. Cooper*, 6 T. R. 226; John. 1, 100.

CROCKETT & BRIGGS for appellee.

1st. The contract was an *entirety*, and embraced all the articles in the plaintiff's line of business, which would be needed to fit out the boat, consequently under the contract he could not have sued for the price of the articles furnished on the 14th Dec., until he had completed the contract by furnishing *all* that she wanted, which was not done until the 22d. In other words, the delivery was not complete, nor the contract fulfilled by the plaintiff until the 22d, and until then he had no cause of action. The contract was an entire thing, and if the delivery had run through a dozen days, some articles being delivered each day, the plaintiff could not have split up his cause of action and maintained a separate suit for each separate delivery, but must wait until all are delivered before he could sue for any.

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2d. That the delivery being complete on the 22d Dec., 1847, and the suit commenced on the 23d June, 1848. The plaintiff's demand is not barred by the statute of limitations. The rule is, that in contemplation of law a day is an indivisible point of time, and there can be no distinction, in computing time, between the act done and the day on which it is done. Wiggins vs. Peters, 1 Metcalf Rep. 127-9; Ewing vs. Bailey, 4 Scam. R. 420; Bigelow vs. Wilson, 1 Pick. R. 485, and numerous authorities collated; 3 U. S. Digest, page 518—title, "Time;" Littleton vs. Christy's adm'r. 81 Mo. R.

A limitation to commence "*from and the passage of an act.*" in computing the time, the day of the passage of the act is to be excluded. King vs. Moore, Jefferson R. 9.

An execution dated 3d June and returnable in three months, may be served on 3d September. Chase vs. Gilman, 3 Shipley, 64.

When time is to be computed from any act done, the day on which the act is done is to be excluded; for a day is to be regarded an indivisible point of time. Fairbank vs. Wood, 17 Wend. 329; 1 Metcalf, 127, 129; Sanders vs. Norton, 4 Monroe, 464; Gore vs. Hodges, 7 Monroe, 520.

In the computation of time from an act done, the day on which the act is done will be excluded, whenever such exclusion will save a forfeiture or prevent an estoppel. Windsor vs. China, 4 Greenleaf, 298.

3. The statute provides that the action shall be commenced within six months after the cause of such action shall have accrued. In the case of Darby, adm'r. vs. St. Bt. Inda, 9 Mo. R. 653, it is held that the liabilities under this clause, "are such as would accrue and upon which an action could be brought within six months after the materials were furnished or the labor done." The six months, therefore, begin to run from the time the act is done, to wit: the materials furnished or the labor done. The authorities above quoted conclusively establish the rule to be, that in such cases the day on which the act is done is to be excluded in the computation, and especially if it be necessary to prevent an estoppel or save a forfeiture. We maintain, therefore, that the judgment of the court below was right.

Judge BIRCH delivered the opinion of the court.

This was an action commenced in the St. Louis court of common pleas, under the statute concerning boats and vessels, to recover the value of certain articles of upholstery furnished to the steamer. It was admitted on the trial that the articles charged in plaintiff's bill of particulars (filed with his complaint) were furnished and delivered by him for the use of the boat, at the dates respectively stated in the bill, to wit: a part on the 14th and the remainder on the 22d of December, 1847. That the prices charged were reasonable, and that the articles were furnished at the request of the captain and owners. It was further proven, that when the contract was made, it was to the effect that the plaintiff should furnish all such articles of upholstery as might be needed for the boat, to be paid for on her return from New Orleans, and that the last articles ordered were furnished on the eve of the boat's departure for that port. The suit was commenced on the 22d day of June, 1848, and the court below having given judgment for the whole amount of the plaintiff's bill, the cause is here by appeal.

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Upon the point first raised, both reason and authority sufficiently concur in fixing the point of time at which the lien should be held to *attach*. Unless commencing coincident with the delivery of the first stores, cases might occur in which the fraudulent removal or incumbrance of the boat, during the subsequent portion even of a day, would defeat the object of the statute, and we can perceive no injustice in so construing it as to guard against such contingencies. Whilst, therefore, for the reasons intimated, a lien, in cases like the present, should be held (at least contingently) to incept or attach, at the time when the first goods are delivered on board the vessel, the rule adopted by this court in the case of *Stine vs. Austin*, 9 Mo. 558, which was a suit under the mechanics lien law, is deemed not only applicable to the account, but most reasonable in reference to the limitation of the action.

Being governed, then, by the least item in the account, and that item having been furnished on the 22d day of December, the remaining question is, whether a suit instituted on the 22d day of June following was within the statutory limitation of six months? This, of course, depends upon the settlement of the question, whether in the computation of this period the day of delivery should be included or excluded. And upon this point the authorities are somewhat contradictory. We incline to the opinion, however, that they preponderate, as they should, in favor of excluding the first day, or rather as regarding it as an "indivisible period of time," covered by the delivery of the goods, when thereby a right can be asserted or a forfeiture prevented. In analogy to these decisions, therefore, the judgment of the court of common pleas is affirmed.

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Where a mechanic renders services, or furnishes materials for a building under a *contract*, the lien attaches under the act of 1835, when the services commence or upon the delivery of the first articles; and the lien is perfected by filing an account within six months after the completion of the contract.

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ERROR TO ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

This was an action of ejectment brought by Vito Viti against D. W. Dixon, for a house and lot of land in the city of St. Louis.

On the trial of the cause it was admitted that at the time of the commencement of the suit, and ever since, the 8th of June 1846, the defendant had been in possession of the premises described in the plaintiff's declaration, with knowledge of plaintiff's claim of title thereto—holding such possession, and claiming under Louis Montany, and the lien hereinafter mentioned. That on the 18th day of Oct. 1841, and until January 1843, Montany had the possession of the premises, and while in possession erected thereon a two story brick house, as the tenant of the plaintiff, and in the course of such erection, the materials, and work, and labor mentioned in the account, contained in the record of the lien under which Dixon claimed, were furnished and done in and upon said house, by Asa Wilgus, under a contract therefor with Montany, at the dates attached respectively, to the several items of said account. The lease from Vito Viti under which Montany had possession of the premises, was duly executed and recorded, and bears date the 29th day of July 1848, and was for the term of ten years from date. The plaintiff next gave in evidence a deed of trust from said Montany, dated the 12th day of May 1842, duly acknowledged and recorded, conveying all the estate and interest vested in him by said lease, together with said house erected as aforesaid, to Wm. Smith and assigns, for the purpose of securing the payment of certain indebtedness therein named, and authorizing said Smith to sell said property and estate in the mode prescribed in the deed of trust; on the failure by Montany to pay said indebtedness at the time it fell due. Afterwards, upon failure of Montany to pay said indebtedness, and on the 21st day of February, 1846, the said trustee duly sold and conveyed, according to the provisions of said deed of trust, all the property and premises therein described, to the plaintiff, and executed to him a proper deed of conveyance in due form, which was also recorded in said recorder's office of the county of St. Louis, on the 8th June 1846.

On the 13th day of Dec. 1842, Asa Wilgus filed his lien under the mechanics' lien law on the house erected by said Montany, on the premises aforesaid, and the following is a copy of the account filed by him for the purpose of perfecting his said lien.

	Louis Montany, to Asa Wilgus,	Dr.
1841.	Oct. 18th, To $\frac{1}{2}$ box glass 8 x 10, at \$4 50.....	2 59
	" " 10 x 12 " 650.....	2 75
" 20	" 9 lbs. putty at 12 $\frac{1}{2}$ cts.....	1 12 $\frac{1}{2}$
" "	Tin points.....	06 $\frac{1}{2}$
" 28	" 1 quart of oil.....	37 $\frac{1}{2}$
1842. July 2	" Paints, painting, glass and glazing, new house out and inside.....	230 00
		\$236 56

After filing his lien as aforesaid, Wilgus instituted his action of common assumpsit, in the St. Louis circuit court, at the November term 1842, against Montany, on the aforesaid account, and obtained judgment for the amount against him by confession.

He then prayed an order of court awarding a special fi fa against the property charged with the lien of the foregoing demand, as follows:

JANUARY 26, 1843.

Asa Wilgus
vs.
Louis Montana. } Judgment \$236 56.

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On application of the said plaintiff by his attorney, and it appearing to the satisfaction of the court that the account on which the judgment in this cause was rendered, has been filed in the office of the clerk of the St. Louis circuit court, as a lien upon the following property, to wit: (property described as in the record) and that the account aforesaid is for work and labor and materials furnished in and about the erection of the above described building, therefore, it is ordered by the court that the property above described be sold according to the form of the statute in such case made and provided, to pay and satisfy the aforesaid judgment, interest and costs. A *fi fa* was issued accordingly.

On said *fi fa* the premises in dispute were sold, and the sheriff conveyed to said Wilgus, who was the purchaser, all the right, title and interest of Montany in and to the same, by deed duly executed, which was recorded. And afterwards Wilgus conveyed the interest thus acquired by him to the defendant Dixon, by deed in due form and recorded.

On this state of facts the court below, sitting as a jury, declared the law to be as follows: That under the lien law of 1835, the mechanic's lien was in existence from the time of the rendition of services, or the delivering of materials under any contract contemplated by said law, and that such lien was perfected by filing a sworn account of the items within six months after the completion of such contract, and it appearing by the record of the case of Wilgus vs. Montany, that these items of Wilgus' account prior to the recording of the deed of trust under which plaintiff claims title, the court are of opinion that the title under said lien is better than that derived from the deed of trust.

POLK, for plaintiff in error.

For reversal of judgment in this case, the counsel of plaintiff in error relies upon the following points:

1st. The mechanics' lien filed by Wilgus incepts at the date of its filing (the 13th Dec. 1842) and not before. Code of 1835 p. 108 secs. 2; 3, 4, 5, 6, 7, 8.

2d. But if the mechanics' lien did not incept at the date of the filing the account, it must have commenced either first, when the first item of the account first accrued, or secondly, when the last item of the account accrued, or thirdly, it attached for and to the extent of each item as and when that item accrued.

If the mechanics' lien dates its inception when the first item of the account accrued, the demand—the entire demand as a whole must also have accrued at the same time. Otherwise the lien would attach before the demand had accrued, which is obviously and plainly impossible.

But if the demand accrued when the first item of the account was furnished by the mechanic, then more than *six months* had elapsed, after the demand had accrued before the account of such demand was filed in the office of the clerk of the circuit court.

But by the express terms of the statute (sec. 2 p. 108) no mechanic can avail himself of the benefit of the act giving liens to mechanics, and material men, unless he files the account of his demand within *six months* after his demand shall have accrued.

3d. If the lien attached when the last item of the account accrued, then, as that item accrued not until the 2d July 1842, after the deed of trust, under which plaintiff claimed was filed for record, the title to the property in question had passed out of Montany before the lien attached to it.

4th. If the lien attached for each item as it accrued, then as the account was not filed according to the statute, within six months after the five first items thereof had accrued, the mechanic could have no lien for those items. But in the account filed he embraced the three first items for which he could not have a lien, as well as the last item for which he might have had a lien, and seeking to avail himself of a lien for the first items, as well as for the last, he thereby lost his lien for the whole of the items—the last as well as the first.

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But if the mechanic could have no lien for the first five items of account, and if his lien attached for the last item when it accrued, then as before that date, the deed of trust under which plaintiff claimed had been recorded, of course the mechanic's lien is postponed to the claimant under the deed of trust.

TODD & KRUM, for defendant in error.

The defendant in error insists that the contract for the work and materials between Montany and Wilgus is to be regarded as an entirety, and by relation the last item of the account relates to the first item.

2d. That Vito Viti claiming under Montany, is in no better position than Montany would be, and that Montany, if he was suing here, could not recover against the title secured under the lien.

Judge BIRCH delivered the opinion of the court.

This was an action of ejectment brought by Viti against Dixon for a house and lot of land in the city of St. Louis.

From the statement agreed upon by their respective attorneys, it appears to have been admitted on the trial below "that at the time of the commencement of the suit, and ever since the 8th of June, 1846, the defendant had been in possession of the premises described in the plaintiff's declaration, with knowledge of the plaintiff's claim of title thereto—holding such possession and claiming under Louis Montany, and the lien hereinafter mentioned. That on the 18th Oct., 1841, and until January, 1843, Montany had the possession of the premises, and while in possession thereof, erected thereon a two story brick house, as the tenant of the plaintiff, and in the course of such erection, the materials and work and labor mentioned in the account contained in the record of the lien under which Dixon claimed, were furnished and done in and upon said house, by Asa Wilgus, under a contract therefor with Montany, at the dates attached, respectively, to the several items of said account.

The lease from Viti, under which Montany had possession of the premises, was duly executed and recorded, bears date the 29th of July, 1840, and was for the term of ten years from date. The plaintiff next gave in evidence, a deed of trust from said Montany, dated the 12th day of May, 1842, duly acknowledged and recorded, conveying all the estate and interest vested in him by said lease, together with said house, erected as aforesaid, to William Smith, and assigns, for the purpose of securing the payment of certain indebtedness therein named, and authorizing said Smith, as trustee, to sell said property and estate in the mode prescribed in the deed of trust, on the failure by Montany to pay

VITO VITI vs. DAVID W. DIXON.

said indebtedness at the time it fell due. Afterwards, upon Montany's failure as aforesaid, the said trustee, on the 21st day of February, 1846, duly sold and conveyed, according to the provisions of the said deed of trust, all the property and premises therein described to the plaintiff, and executed to him a proper deed of conveyance, in due form, which was also recorded in said recorder's office of the county of St. Louis, on the 8th day of June, 1846.

On the 13th December, 1842, Asa Wilgus filed his lien, under the mechanics' lien law on the house erected by said Montany on the premises aforesaid. The following being a copy of the account filed by him for the purpose of perfecting his said lien.

		Dr.
1841.	Oct. 18, to 1-2 box glass, 8 x 10, at \$4 50.....	2 25
	" " 10 x 12 " 5 50.....	2 75
	" 20 9 lbs. putty at 12½ cts.....	1 12½
	" " Tin points.....	06½
	" 28 1 quart of oil.....	37½
1842.	July 2 Paints, painting, glass, and glazing new house inside and out.....	230 00
		<hr/> \$236 56½

After filing his lien as aforesaid, said Wilgus instituted his action of common assumpsit in the St. Louis circuit court, at the November term 1842, against Montany, and obtained judgment against him, by confession for the amount of the foregoing account, and under the special fieri facias awarded and issued against the property charged with the lien, the premises in dispute were sold, and the sheriff conveyed to said Wilgus, who was the purchaser, all the right, title and interest of said Montany. This deed to Wilgus was duly executed and recorded, and he subsequently conveyed the interest thus acquired to Dixon, by deed in due form, and recorded.

Upon this state of facts, the court below, setting as a jury, declared the law to be as follows :

"That under the lien law of 1835, the mechanic's lien was in existence from the time of the rendition of services or the delivery of materials under any contract contemplated by said law, and that such lien was perfected by filing a sworn account of the items within six months after the completion of such contract, and it appearing by the record in the case of Wilgus against Montany, that these items of Wilgus' account bear date prior to the recording of the deed of trust under which

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plaintiff claims title, the court are of opinion, that the title under said lien is better than that derived from the deed of trust."

As from all that appears in this case, there was but a single contract, covering all "the materials and work and labor mentioned in the account," to affirm the judgment of the court will be but in accordance with the spirit of one of the previous decisions of this court. 9 Mo. 558, and with the analogous reasonings and conclusions just delivered in the case of Beehler vs. the steamer Mary Blane. We regard the object of both laws as being essentially the same—to wit, to secure to laborers and furnishers a priority of lien coincident and co-extensive with their contracts. In this case, Montany himself could not have divested Wilgus of the right he acquired, by his contract, to complete the job he had undertaken; and having completed it, for all that appears to the contrary and according to his engagement, his lien for all he performed under it, should be held paramount to any subsequent incumbrance. The judgment of the court of common pleas is therefore affirmed.

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1. Where a transcript of a judgment, rendered in another State, shows that the "writ was executed by a deputy sheriff and returned by him as such," but states that it was "duly and legally executed," the presumption is that it was done according to the laws of that State.
2. Where such transcript contains a commission from the Governor of the State, to a person appointing him special judge, the appointment is presumed to have been legal, although the commission does not purport to be under the great seal of State.
3. The declaration sets out the judgment under a "*prout patet per recordam*," as a judgment for \$125: together with the plaintiff's costs in that behalf expended, which are averred to amount to the sum of \$10. The record offered in evidence showed a judgment for \$125, and costs generally, without specifying any amount. Held, to be a fatal variance.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

This was an action of debt brought by Pritchett against Lackland, upon a judgment ren-

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dered by the circuit court in the county of Shelby and State of Tennessee, on the 2d day of June, 1845.

The said Lackland pleaded the statutory plea of the general issue, and on the trial in the court below, which was submitted to the court sitting as a jury, the plaintiff offered in evidence a paper purporting to be a transcript of said circuit court in Tennessee, to the reading of which in evidence the defendant objected. The court overruled the objection, and permitted said transcript to be read in evidence, to which the defendant excepted. The said transcript contains a commission from the Governor of Tennessee to John C. Humphreys, appointing him special judge for said circuit court, for the February term, 1845; but said commission does not state that the great seal of the State of Tennessee was thereto attached, and it appears from said transcript, that at said February term, there was pending a suit wherein said Pritchett was plaintiff and one James W. Goslee was defendant; that said Lackland was summoned as a witness in said suit, and he not appearing to testify in said cause, a judgment nisi was taken against him for \$125 in favor of said Pritchett as a forfeiture, unless he appeared at the June term, 1845, of said court, and show cause to the contrary, and that said Lackland be notified of the fact by scire facias. The scire facias was issued, and delivered to R. A. Allen, deputy sheriff, executed by him as deputy, and returned by him in his own name as deputy sheriff, and at said June term said Lackland not appearing, said judgment was made final. The court of common pleas found a verdict for the plaintiff for \$125 debt, and \$38 20 damages, and rendered judgment in accordance to said verdict on the 28th November, 1848. The defendant made a motion for a new trial on said day, and on the 10th of December, 1848, the said court gave leave to said plaintiff to amend his declaration by erasing "which plaintiff says amounted to the sum of \$10," and the plaintiff entered a remitter for \$12, and then the court overruled the motion for a new trial.

LACKLAND & JAMISON for appellant.

1. If a court render judgment in a case where it has not jurisdiction of the subject matter and of the parties, such judgment is null and void. Latham vs. Edgerton, 9 Cowen Rep. 227; Mills vs. Martin, 19 John's. Reports, 33; Borden vs. Fitch, 15, John's. Rep. 141; Slocum vs. Wheeler, 1 Com. Rep. 429; Wilson vs. Jackson, 10 Mo. 329.

2. To give jurisdiction to the court over a party defendant, it is necessary that he should be duly served with process to appear and defend, unless he voluntarily appears. Hall vs. Williams, 6 Pick. Rep. 246; Aldrich vs. Kinney, 4 Com. Rep. 380; Bissell vs. Briggs, 9 Mass. Rep. 444, side pages; Hollingsworth vs. Barbour & others, 4 Peters' Rep. 472; Story's Com. on conflict of laws, page 1004, (3 Edt.) sec 609.

3. The judgment rendered in the Tennessee circuit court, and upon which this suit is brought, is null and void. First, because there was no legal service of the writ of scire facias, nor any appearance of said Lackland in said suit in Tennessee; nor had he any personal notice of said suit. The scire facias was delivered to R. A. Allen, deputy sheriff, received by him as deputy, executed and returned by him in his own name as deputy sheriff. Harrison et al. vs. The State, 1 Mo. Rep. 358; Atwood vs. Reyburn, 5 Mo. Rep. 358; Ditch vs. Edwards, 1 Scammon Rep. 127; Ryan vs. Eads, Breese Rep. 168; Simonds vs. Catlin, 2 Caines' Rep. 66; Snellgrove vs. Branch Bank, 5 Ala. Rep. 295; 2 Jacob's law dictionary, title deputy page, 251; Woods Just. 74; Evans vs. Wilder, 7 Mo. Rep. 362; Evans vs. Ashley, 8 Mo. Rep. 177, 182; State vs. Edwards, 4 Humphrey's Rep. 228; Stewart vs. Cave, 1 Mo. 540. The return of the officer is the competent evidence of the service of the writ. Perry vs. Daver, 12 Pick. 212.

2nd. The return on the scire facias does not show how and where the writ was executed. Charless vs. Marney, 1 Mo. Rep. 382; Ogle vs. Coffey, 1 Scammon Rep. 239; Perry vs.

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Daver, 12 Fick. Rep. 211; Weaver vs. Springer, 2 Miles' Rep. 42; Davis vs. Maynard, 9 Mass. Rep. 236; Inhabitants of Lancaster vs. Pope, 1 Mass. Rep. 87.

3rd. That the subpoena in the case of said Pritchett vs. Goslee was not directed to the sheriff or any officer of the county where said Lackland resided, according to law. Statutes of Tenn. by Caruthers & Nicholson, page 711—title Witness Chap. 1 sect. 28.

4th. That said Lackland was not summoned as a witness in said suit at the instance of said Pritchett according to law. See the last reference.

5th. The said Lackland not being a resident of the State of Tennessee when he was summoned as a witness in said suit of Pritchett vs. Goslee, he was not liable to said forfeiture for not appearing as a witness in said suit. Said Statutes of Tenn. page 711, 712—title witnesses' chap. 1; sec 28, 29, 30, 31, and page 243—title depositions, chap. 1, sec. 1.

6th. That the commission of the Governor of Tennessee, appointing John C. Humphreys special judge, is not under the great seal of the State as by law required. It does not appear what seal of State is thereto attached. All his acts as judge are, therefore, null and void. Art. 3, sec. 16; art. 6, sec. 11 of Constitution of Tennessee, printed in the Statutes of Tennessee by Caruthers & Nicholson, pages 54, 56. Said Statutes of Tenn. page 239, chap. 68, sec. 3.

7th. That the penalty was not assessed by a jury as by law required. Constitution of Tenn. chap. 6, sec. 14; said statutes, page 57; George vs. Murphy, 1 Mo. Rep. 558.

4. There is a variance between the declaration and the said Tennessee transcript, which is fatal. The declaration is for \$125 and costs, not specifying any sum. Ferguson vs. Frizel et al. 1 Mo. Rep. 313; Gile vs. Shaw, Breese Rep. 87; Biffins vs. Naxon, 4 Wend. Rep. 207; Wash vs. Foster, 3 Mo. Rep. 147.

5. The transcript does not contain all of the record of the said Tennessee suit. The subpoena in the case of said Pritchett vs. Goslee, should be set out in the transcript.

6. The court of common pleas erred in permitting the plaintiff to amend his declaration after the judgment was rendered. Revised Statutes of Mo. 1845, Practice at Law, art. 6, sec. 3, page 430, Chambers & Knapp Edt.

CROCKETT & WHITTELSEY, for appellee.

The judgment below was properly given; there was personal service on the defendant in Tennessee, and he cannot now question the judgment of the Shelby circuit court or its effect. See Mills vs. Durgle, 7 Cr. Neh.; 2 Hare & Wallace, Am. L. p 538.

The court did not err in permitting the plaintiff to amend. Neitenberger vs. Campbell, 12 Mo.,

Defects in record and proceedings cannot be taken advantage of collaterally: McNair vs. Biddle, 8 Mo. 257.

Judge NAPTON delivered the opinion of the court.

The declaration in this case is upon a judgment of the circuit court of Shelby county, Tennessee, for \$125 and costs rendered in 1845. The declaration sets out the judgment under a *prout patet per recordam*, as a judgment for \$125, together with the plaintiff's costs in that behalf expended, which are averred to amount to the sum of ten dollars.

The record offered in evidence under the statutory general issue, showed a judgment for \$125 and costs, but no amount of costs was spe-

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cified in the judgment or taxed by the clerk in the record, as prescribed by the bill of exceptions.

The record shows that there was issued a writ of subpoena, directed to the sheriff of Shelby county, to summon the defendant to appear before the circuit court for that county on a day named therein ; that said writ was duly executed, and that Lackland failed to appear ; that a judgment *nisi* was entered against him for \$125, agreeably to the laws of Tennessee ; that a *scire facias* was duly issued and placed in the hands of the deputy sheriff, and by him duly and legally executed upon said Lackland ; and thereupon a judgment was given for the said sum of \$125 and costs.

No objection was taken to the authentication of the record.

The principal objection made in this court to the validity of the Tennessee judgment, is based upon the fact that the writ of *scire facias* was served upon Lackland by a deputy sheriff, which service it is contended both by the law of Tennessee and of this State, is a nullity. The objection, in our opinion, is not tenable. The record states that the writ was duly and legally executed by R. A. Allen, deputy sheriff of Shelby county, upon the defendant. This is certified to us by the court of Tennessee which tried the case. We do not pretend to know more of the laws of Tennessee than her own courts. What authority a deputy sheriff may exercise in that State cannot be judicially known to our courts. The record is evidence that the defendant was duly served with notice according to the laws of Tennessee.

It will be observed that there was no evidence offered in this case to rebut the record. Certainly it has never been maintained any where, that where the record of a court shows a service of process, a court of a neighboring State before which the validity of the judgment comes in question, will undertake to enquire into the legality of the form of service or form of the writ, without a special plea, making an issue upon the fact of notice. The record is certainly *prima facia* evidence in all cases. It has been questioned whether the fact of notice can be disputed at all, when the record sets forth a notice. However this may be, there must be a special plea, or under our late statutory plea, there must be evidence offered to contradict the record on this point.

In the present case, there was no evidence offered, either to show that there was no service, or to show that by the laws of Tennessee there was no such officer as a deputy sheriff, or if such, that he had no power to return writs in his own name. Of these matters we can know nothing.

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Another objection is made to the record, because the commission of the special judge who tried this case is not under the great seal of State as required by the laws of Tennessee. The same answer applies to this objection as did to the former. The laws of Tennessee are not in evidence.

The third objection relates to the question of variance. The judgment exhibited was for \$125 and \$10 costs. This variance under the previous decisions of this court is fatal. In the case of Warder vs. Evans, (2 Mo. R. 205) the declaration averred a judgment for \$420 52, and for the further sum of \$17 61 costs, and the judgment offered in evidence was for \$420 52, and generally for costs; but it appeared by bill of exceptions that the costs taxed by the clerk, as certified in the record, amounted to the sum of \$17 61, and this court, therefore, held there was no variance. In Wash vs. Foster, (3 Mo. R. 205) a similar objection was taken and sustained, because the costs taxed were not *sub pede sigilli*; that is, were not in the record as certified by the bill of exceptions. There is no difference between the case of Wash vs. Foster and the present; the record, as preserved by the bill of exceptions, contains no taxation of costs. It cannot be doubted that this variance cannot be cured by amending the declaration after judgment. The amendment does not belong to any class enumerated in that article of our practice act which includes the old statute of feofails. The issue was materially altered by this amendment. For this reason the cause will be remanded. Judgment reversed.

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Where A appears in the body of an agreement to be the contracting party, and his name is signed to it at the proper place "A. by his agent C," it is the contract of A, and C cannot be made liable upon it.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

The plaintiff instituted in the St. Louis court of common pleas, his action of assumpsit.

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The first count was on a special agreement, as appears by the declaration, to have been entered into by the parties. To this count there was a general demurrer: this demurrer the court sustained, and defendant below had judgment on the demurrer, the other counts having been withdrawn by plaintiff.

The only question for this court to consider is whether the court below erred in sustaining the demurrer.

HUDSON for appellant.

The counsel for the appellant contends that the judgment of the court below was erroneous, and relies on the following points and authorities as sufficient grounds for the reversal of the same.

1. The declaration sets out an agreement which contains a promise on the part of defendants, to pay for the corn which might be shipped to them by the plaintiff, and charges that corn was shipped, and that they agreed to pay, &c. These facts are admitted by the demurrer. But it is insisted that defendants acted as agents for Schiff, and are not personally liable. This ground is not tenable. It is well settled that an agent acting for a foreign principal will be liable personally for goods, &c., purchased for his principal. Smith's Mercantile Law, 145.

2. It does not appear from the declaration whether Schiff was a resident or foreign merchant, nor was it necessary that the declaration should charge that he was a foreign merchant. That was a fact to be ascertained on the trial of the cause. If he was a foreign merchant, or irresponsible, the plaintiff would have been entitled to recover against defendants for the amount of corn shipped by plaintiff to them. Smith's Mercantile law edition of 1847, page 145.

3. The agreement on its face shows, that notwithstanding the corn was purchased for Schiff, that the defendants agreed to pay for it, and to secure themselves against loss, it was stipulated that the corn should be shipped to them. This agreement was drawn and signed by the defendants, and they are bound by the stipulations therein contained. 1b. 147; 13 J. R. 310; 7 Cowan, 453.

4. The court below erred in sustaining the demurrer; for it is well settled that if the credit was given to the defendant they would be personally liable, even though they acted as agents. and the question to whom credit was given, was one which should have been left to the jury on the trial. Smith's Mer. Law, 146.

5. The law seems to be well settled, that in actions to make agents personally liable, the question to whom the credit was given is proper to be considered, and one which should be determined upon the evidence at the trial.

6. The court below, by sustaining the demurrer to the declaration, deprived the plaintiff of the right to show the liability of defendants under any circumstances or state of facts.

7. Ordinarily if the contract is made so as directly to bind the principal, the agent will not be personally bound; but the question still remains whether the form of the instrument does or does not import a personal liability on the part of the agent? In the agreement declared on there is an express understanding on the part of defendants to pay for the corn, and they are personally liable. Story on Agency, ed. of 1839, 146, 149, 259, 276; 2 Kent. Com. ed. of 1832, page 631.

8. In most cases of purchases and sales of goods, through the instrumentality of agents, the great question is, to whom credit was given. Whether to the principal alone, or to the agent alone, or to both. Story, 261.

9. If an agent should purchase goods for his principal, and by any memorandum in writing agree to pay for them, the agent will be personally liable. In the case now under consideration, it appears that defendants bought the corn for Schiff, and agreed to pay a stipulated

THOMPSON vs. CHOTEAU & VALLE.

price for it, and signed an agreement to this effect. They should not be permitted to avoid this understanding by setting up that they acted as agents. Story on Agency, 266.

10. Agents acting for residents abroad are held personally liable on all contracts made by them for their principals, and this without any distinction whether they describe themselves as agents or not. In such cases it is presumed that the credit was given to the agent. Story 265, 266.

SPALDING for appellee.

1. The instrument is between only two parties, Shiff, by Choteau & Valle, his agents, on one side, and Thompson on the other; and it is thus signed.

2. It so reads on its face. The agreement to deliver by Thompson is to *Shiff*, not to Choteau & Valle.

3. The agreement to pay is by *Skiff on the face and by the words of the instrument*, for the statement is, that "Shiff agrees to receive not exceeding 12,500 bushels of corn, and to pay therefor at the rate of 40 cents per bushel, &c."

4. In the after part of the agreement when a place is designated for delivery and payment, it is stated that the corn is to be delivered at St. Louis to Choteau & Valle, and *payment to be made by them*. But this is not a personal engagement by them to pay at all events. This phrase is not to be wrested from the context and made to mean what it would mean in a contract signed by them in their own names as principals.

5. This article is written below another between Shiff and Thompson, and refers to the other, and states that it supersedes and cancels the other, which it would not do unless it were Shiff's contract. Thompson accepts the latter as Shiff's and adopts its statements, and on this demurrer is to be held to them.

6. The only foundation, as it seems to me, for the pretence of the personal liability of Choteau & Valle, is in the omission in the article to say that they would pay as agents of Shiff; but such an omission in a short memorandum cannot alter the whole nature of the agreement. The context, the former agreement, which is also a part of the declaration and signatures, render it certain that Choteau & Valle were acting only as agents.

Story on Agency, p. 62, 63, 64, 65, 66, 69, as to construction of agreements.

Ibid, p. 146-7, sec 155, 156, 157, 161, as to liabilities.

Ibid, 261, sect. 263, that agent acting in name of principal is not bound.

Ibid, p. 266, sect. 269, where agent would be liable as contracting in his own name.

Ibid, p. 276, sect. 275, leases are mentioned where it was disputed whether agent contracted in his own name and was bound or not; and page 143, sect. 154, many instances are given where contracts do not bind agents, though contracts so made as to be subject to doubt.

Judge NAPTON delivered the opinion of the court.

The special agreement upon which this action of assumpsit is based, was executed by the parties in discharge of a previous agreement signed by "J. T. V. Thompson and A. Shiff for Jacob M. Ober." The substitute agreement relates to the same subject matter, and is signed by "A. Shiff, by his agents Choteau & Valle and J. T. V. Thompson." In this last agreement Thompson "agrees to furnish not exceeding 12,500 bushels of good merchantable corn to said Shiff, to be paid for at the rate of 40 cents per bushel of 56 pounds, and the said

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Shiff also, in full of the written contract, agrees to receive not exceeding the said 12,500 bushels of corn, and to pay therefor at the rate of 40 cents per bushel, clear of all charges, payment to be made at St. Louis, by Choteau & Valle, and the corn to be shipped to Choteau & Valle, at St. Louis, by said Thompson, within the ensuing month, to be at Shiff's risk and expense when on board the steam boat. The declaration avers the delivery of the corn, and that by the agreement the defendants, Choteau & Valle, were bound to pay the six thousand dollars. The only question for our determination is, whether the contract, as set out, bound the defendants.

The general principles which regulate the liabilities of principal and agent are not disputed. Where the agent acts in the name of his principal the agent is not liable. Patterson vs. Guad, 15 East. 162. But this rule has its exceptions; it does not apply when the principal is unknown to the party dealing with the agent; nor where there is no responsible principal to resort to; nor where the agent makes the undertaking his own.

The only question in this case is whether the agent has made the contract his own. The contract is set out in *pace verba* in the declaration, and no question in relation to the principal being a foreigner, or unknown, or irresponsible, are presented by the case. The written contract alone is relied on.

Can there be any doubt that Shiff, the principal, was bound by this contract? It is executed in his name, and signed by his agents for him in precisely that form directed by the law, when the agent intends to bind the principal. Spencer vs. Field, 10 Wend. 87. Thompson agrees to deliver the corn to Shiff, and Shiff agrees to pay for it at the rate of 40 cents per bushel. It is true that this payment is to be made at St. Louis, and by Choteau & Valle, but that seems to be a mere designation of the place and mode of payment. Choteau & Valle take care not to bind themselves to any thing. Their names are not to the instrument except as agents. It is Shiff's contract to pay through Choteau & Valle; not the contract of Choteau & Valle. It does not appear upon the face of the writing that Choteau & Valle have made any contract with the plaintiff. They have merely executed a contract for Shiff, their principal, and executed it in the name of their principal, so as to bind him and not them. What facts may exist outside of the instrument of writing, which might subject them to responsibility, cannot be considered in this case. No such facts are alleged in the declaration. Judgment affirmed.

BURT McKAY vs. THE STATE OF MISSOURI.

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1. Where a criminal cause has been continued until the next regular term, upon the application of the State it is error for the court three days after to set aside the order of continuance and put the defendant upon his trial at an adjourned term against his consent.
2. Where the circuit court refuses to grant a continuance to a party showing good and sufficient cause, such as the absence of material witnesses, it is good ground for reversing the judgment.

APPEAL FROM JEFFERSON CIRCUIT COURT.

BEAL & PIPKIN, for appellant.

The court below erred in setting aside the order of continuance, and setting the case for trial on the 18th Dec. There are only two regular terms of court in Jefferson county—4th Mondays of May and November. Revised statutes page 325 sec. 25. After the court, on the 28th Nov. ordered a general continuance to the next term, the cause stood continued to the 4th Monday in May 1849, and the jurisdiction had passed from the court, and the cause stood over as any other cause. The court could not resume its jurisdiction by setting aside the continuance on the 30th, for it would be inflicting the greatest injury upon a party, if such arbitrary power were given at the pleasure of the court, the law regulating changes of venue in criminal cases, (statute p. 877 sec. 34) is different from all other cases. The witnesses, after removal of the cause, are compelled to attend at the time and place of trial in the county to which it is removed; and if the order of removal is made in term time, it is notice to the witnesses. (Sec. 35.) In this case after the continuation of the cause on the 28th, the defendant's witnesses had left the court, and gone to distant counties, and could, by no means, know of the continuance being set aside, and of course no notice to them—here is the great hardship of the case.

The statutes permit a called term of the court to try prisoners confined in jail, and a prisoner be tried, yet, in that case, a notice has to be given, and a grand jury summoned, &c., before any jurisdiction attaches. The law of continuance in criminal cases, is the same as in civil cases, and in this latter suit a continuance is from the term to the *next term, or any subsequent term*, so that after a continuation is entered of record, the suit stands over, the witnesses disperse, and the suit is at an end for that term.

2d. The court erred in overruling the defendant's motion for a continuance made at the adjourned term. McLane vs. Harris, 1 Mo. Rep. 700; Riggs vs. Fenton 3 M. R. 28; Moell & Porter vs. McCullough 6 M. R. 444; 8 M. R. 500; 8 do. 606; Darn vs. Broadwater M. R. 19.

3d. There was no ownership of the money alleged to have been stolen proven as the property of Timberlake. The ownership of property is always material, and from the evidence Timberlake had no claim to the money and never took any steps to reduce it to possession. On the contrary if we can infer any thing, it would be presumed to be the money of the owners of the steam boat in whose employ the negro was at the time, and had been previously. If there was a doubt whose money it was, it should have been charged in the indictment as the property of a person unknown to the grand jury. The owner of the slave had not been in possession of the money, the negro was hired out at the time. It is fairly deducible from the evidence, that the persons who hired the negro were his owners for the time being, and the indictment should charge the fact accordingly, that they were entitled to his wages and earnings of the slave. (Reg. vs. Rudick 8 C. & P. 273; Con. Law R. No. 34 p. 368.) The possession of a servant is the possession of his master, but this is only in cases where the master has been in possession of property, or it has been delivered to the slave for the master. The court erred in giving the instruction for the State on this point, as there was no evidence to support the instructions, and the master of the negro never reduced the money to possession, actually or constructively, but abandoned all claim he might have had,

BURT MCKAY vs. THE STATE OF MISSOURI.

and has never been in possession actually of the slave since he was hired to the steam boat, and had not for some time previous to the alleged offence. 2 Starkie edition of 1842 pages 607-8. "Therefore, unless the prisoner, whose property is alleged to have been stolen, be either actually or constructively in possession, the taking cannot amount to larceny." There was no evidence of either an actual or constructive possession in Timberlake. A constructive one cannot arise here, as the slave was hired out at the time, and the money was not actually Timberlake's by any delivery from Timberlake, or from any one else for Timberlake's benefit, but on the contrary he abandoned any ownership that might arise, and if any could arise, it was in the masters for the time being--the steam boat and his employers. They were entitled to his wages and labor and earnings.

Judge RYLAND delivered the opinion of the court.

The appellant, Burt McKay, was indicted with one Hugh Gillespie, in the St. Louis criminal court for grand larceny at the July term 1848. To this indictment the defendant, the present appellant, plead "not guilty," so did Hugh Gillespie. They also prayed for a separate trial, and filed their petition for a change of venue. The court ordered a separate trial, and changed the venue to the circuit court of Jefferson county, in the ninth judicial circuit of this State.

At the regular term of the circuit court for said county of Jefferson, begun on the fourth Monday, being the 27th day of the month of November, 1848, the following proceedings were had, as appears from the record in this case :

"TUESDAY, November 28, 1848

State of Missouri

vs.

Burt McKay and Hugh Gillespie.

} Indictment for grand larceny.

And now upon the motion of the attorney for the State, this cause is continued to the next term of this court, and upon the motion of the attorney for said defendants, it is ordered by the court, that said defendants, Burt McKay and Hugh Gillespie be remanded to the common jail of St. Louis county, and that the sheriff of Jefferson county, convey the bodies of the said defendants to the said county of St. Louis, and there deliver them to the keeper of said common jail of said county of St. Louis.

THURSDAY, November 30, 1848.

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Be it remembered, that on Thursday, November 30th, the counsel for the State moved the court to set aside the order for the continuation of this cause, and set the cause for trial, showing to the court that he had notified the defendant's counsel of this application, and stating that his only witness had arrived in town, and was now in the last stages of consumption, and would not probably live to the next term ; and further,

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that Col. Field was yet in town, whereupon Capt. Jno. D. Stephenson, as the friend of Mr. Field, he having left the court, and making preparation to return to St. Louis, presented and read to the court the following affidavit.

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This day personally appeared in open court, A. D. Field, who being duly sworn, deposes and says that he is the only counsel employed to defend the above persons, that he is in possession of the facts of their case; that their cases have been continued until the next term, that they were set for trial on Tuesday: he further states that he is employed in several important criminal cases in the St. Louis criminal court, some of them where he is the only counsel, several of them set for trial on to-morrow, which compels him to leave this morning for St. Louis: he further states that for the last two days he has been laboring under severe indisposition, so much so that he is entirely unable by reason of said indisposition to attend to the defence of said McKay and Gillespie, and that for the reasons aforesaid, as well as others, he objects to the setting aside the continuance.

A. P. FIELD.

Sworn to and subscribed in open court, Nov. 30th, 1848.

T. H. ALFORD, Clerk.

Whereupon the court set aside the continuance, and made an order setting the cause for trial, to wit:

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And now it is here considered by the court, that the order of continuance and the order of transmission of said defendants to the common jail of St. Louis county made herein, be set aside, and said cause is set for trial on the 18th day of December next, and it is ordered that said defendants and their counsel be notified thereof."

From the record it appears that the appellant regularly excepted to the opinions and decisions of the court in setting aside the order for the continuance, as well as the making of the order for the trial on the 18th of December. On the 18th of December the court met pursuant to adjournment, and the court was regularly adjourned until Wednesday, the 20th day of December, when the following proceedings were had (viz:)

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And now at this day comes the defendant by James A. Beal, his attorney appointed by the court, and presents his affidavit for a continuance of the above cause as follows:

Burt McKay being duly sworn, upon his oath says, that he cannot

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safely proceed to trial in the above suit, for the want of four material witnesses ; that he has used due diligence to procure the attendance of said witnesses, but that they are absent without the consent of the affiant, that he caused subpœnas to be issued for said witnesses in time, and as soon as he could ; that said subpœnas have not been returned ; the subpœnas were sent to St. Louis county, where the witnesses reside.

This case was continued by the State at last term, and all of this affiant's witnesses were not present ; and James Carns, a material witness for defendant, has gone out of the State since the cause was continued, and has not returned, and consequently did not know of this adjourned term, and could not be subpœnaed by defendant. This affiant considers all of aforesaid witnessess material to his defence, without whose testimony he cannot safely proceed to trial, and he knows of no other witnesses by whom he can prove the same facts ; that he has a good defence, and this application for a continuance is not made for delay or vexation, but that justice may be done, and if a continuance be allowed, he will be able to procure the attendance of said witnesses in time for his trial.

B. McKAY.

Sworn to and subscribed in open court, Dec. 19th, 1848.

J. H. ALFORD, Clerk.

Which being seen and heard, and it further appearing to the court from personal inspection, that Silsby, the State's witness, who resides in Illinois, is now in the last stage of consumption, and by every probable calculation will not be alive or able to attend the court at the next term, and the counsel for the State stating that the witness is the only one by whom he can prove the fact of taking the money, the said motion for a continuance was by the court overruled."

This opinion and decision of the court was duly excepted to. Thereupon a trial was had—the jury found the defendant guilty, and assessed his punishment at five years imprisonment in the penitentiary. Bills of exceptions taken in this case, shew all the evidence given on the trial, and also the defendant's motion for a new trial, which was overruled by the court. Among others, the following reasons were given in support of the motion for a new trial, and were assigned as causes therefor, viz : "3d. Because the court erred in setting aside the order of continuance at the regular term, and setting the suit for trial on the 18th day of December, 1848. 4th. Because the court erred in overruling said defendant's motion for a continuance made at this adjourned term."

I have considered it unnecessary to include in this opinion the evidence given, or to notice the instructions asked and given, or refused

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to be given on either side, as I am clearly of opinion that the case should be reversed for the improper action of the court in setting aside the order of continuance made at the regular term of said court, and its subsequent refusal to grant the defendant a continuance at the adjourned term. Let us for a moment look at the facts as they appear on the record in this case.

On the second day of the regular term of the court, the counsel for the State moves the court to continue this case—his motion prevails—the case is continued until the next regular term. An order is made to have the defendant removed to the jail in St. Louis county, and the case, so far as it regards this term, appears at an end. On the fourth day of the term, the counsel for the State moves the court to set aside the order of continuance, and the order remanding the prisoner to St. Louis jail: it appears that he notified the defendant's counsel of his intended application for the setting aside—the defendant's counsel objects, but the court sustains the motion, and sets aside the order of continuance, and fixes the trial for an adjourned term to commence on the 18th day of December following, and orders that the defendant and his counsel be notified thereof. From the record it is a fair presumption that the defendant knew nothing of this order at the time, that his witnesses had dispersed, left the court when the case was continued on the 2nd day of the term. Such a procedure is too dangerous to the life and liberty of the citizen, and though it may sometimes happen without any injury to the defendant, yet as a practice it should not be tolerated.

On the 18th of December following the court met pursuant to adjournment, and on the 20th the defendant makes his motion for a continuance, and files his affidavit, which is set forth in this opinion. The affidavit, although not made with as much technical precision as it ought to have been, yet contains good and sufficient grounds to support the motion for the continuance. The absence of witnesses who had been present at the last continuance, material for the defence, one of whom had gone out of the State, and could not be subpoenaed in time for the adjourned term, and who knew nothing of the adjourned term in all probability. Indeed, from the record it is fairly to be presumed that the circuit court considered the affidavit sufficient to support the motion and to warrant the continuance; but it looked beyond the affidavit, for causes to support its action, and accordingly I find that from "personal inspection it appears to the court that Silsby, the State's witness, who resides in Illinois, is now in the last stage of consumption,

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and by every probable calculation will not be alive or able to attend the court at the next term, and the counsel for the State stating that the witness is the only one by whom he can prove the fact of taking the money, the said motion for a continuance is overruled," to be placed on the record as the reason for overruling the motion for the continuance. Here the probability of the death or inability of the State's witness to attend the next term, and his being an only witness to an important fact, is given as the reason for forcing the defendant into trial, in the absence of his material witnesses. I consider this an unsound exercise of judicial discretion. In a case involving the life or liberty of the citizen, too much consideration is very seldom found—"audi nulla unquam de morte hominis cunctatio longa est."—and with us his liberty is placed nearest in importance to his life.

The refusal to grant a continuance to a party showing good and sufficient cause for it, has uniformly been considered by the court as a sufficient ground for reversal, See McLane vs. Harris; 1 vol. Missouri Reports page 700 (old edition;) Riggs vs. Fenton, 3 Mo. Rep, 28; Moore & Porter vs. McCullough, 6 Mo. Rep. 444; Tunstall vs. Hamilton, 8 Mo. Rep. 500; Dane vs. Broadwater, 9 Mo. Rep. 19.

I consider that the circuit court erred in setting aside the order of continuance, and erred in refusing to continue the case at the adjourned term, on the defendant's motion and affidavit, and for these errors should be reversed. I have taken no notice of the evidence or instructions in this opinion, but as the case may have again to be tried, I will remark, that the law does not consider the negro slave capable of being the owner of property. The money, therefore, of the slave is the money of the master, and there is no error in the instructions of the court on this point.

My brother judges concurring in this opinion, the judgment of the circuit court is reversed, and the cause remanded.

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APPEAL FROM JEFFERSON CIRCUIT COURT.

Judge RYLAND delivered the opinion of the court.

The facts in this case are similar to those in the case of the State vs.

ISAAC N. BRYSON vs. ROSANNA CAMPBELL.

Burt McKay, decided at this term. The defendants, Burt McKay and Hugh Gillespie, were indicted in the St. Louis criminal court together. The venue was changed to Jefferson circuit court; separate trials were had, and the same points and questions arise in each case. The opinion, therefore, given in McKay's case will answer for this case.

The judgment of the circuit court is reversed, and the cause is remanded with directions to grant a new trial.

ISAAC N. BRYSON vs. ROSANNA CAMPBELL.

Marriage is a civil contract, and cannot be dissolved by the State Legislature.

APPEAL FROM PIKE CIRCUIT COURT.

GLOVER & CAMPBELL, AND PORTER for appellant.

The act of the legislature divorcing Bryson and wife was constitutional, and dissolved the mutual relations between them. The counsel for the appellant never having seen propriety of the decision in the case of State vs. Fry. But being well satisfied of the legislative power to grant divorces, and believing that the doctrine laid down in that case is not satisfactory to the bar generally, respectfully solicit a review of the grounds on which it was decided. They will not attempt to add any thing to the able argument already before the court.

A. H. BUCKNER for appellee.

In the case of Bingham vs. Miller, 17 Ohio Reports, p. 445, the court say emphatically that "the constitution confers no such power;" yet strange to say they declare this void and unconstitutional act valid, because sooth, the legislature have assumed this power for more than forty years. In the Kentucky case, Gaines vs. Gaines, reported in the May No., 1849 Western Law Journal, page 363, will be found a very profound argument on this question, and the court take a distinction, as to the effect of a legislative divorce, which, if it had occurred to the Ohio court, would have produced a different opinion from that tribunal.

Judge BIRCH delivered the opinion of the court.

This was a suit to recover the sum of \$217 50 for boarding the wife of Bryson after he had obtained an act of legislative divorce; and

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the only question presented by the record concerns the constitutional competency of the general assembly to pass such laws. The authority to do so was disaffirmed by a former bench of this court, in a case (*Gentry's case*, 4 Mo. Rep. 120) originating before the legislative enactment of 1835, which has remained in force ever since, and which declares in concurrence with the judicial opinion alluded to, that marriage is "a civil contract." The marriage in question having taken place subsequent to the act aforesaid, and under what we consider its express guaranties, to sanction the legislative competency to interfere with such a "contract," would be scarcely less objectionable upon the score of public justice, than it has heretofore been deemed to be incompatible with public policy and the constitutional distinction of the powers of government.

The judgment of the circuit court is therefore affirmed.

NAPTON, J., gave no opinion.

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Any malicious *printed* publication, which tends to expose a man to ridicule, contempt, hatred, or degradation of character, is a libel.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

LESLIE & LORD for appellant.

The words charged to have been published in either count of the declaration are not actionable *per se*. In every count they are as follows: (without *inuendo*.) "R. F. Sass, steam boat agent, this impudent person withheld from us on Saturday, New Orleans papers of a late date, entrusted to him for this office by the clerk of the Lucy Bertram. We desire our steam boat friends hereafter to retain favors intended for the Reveille in their own hands until called for, as we put no trust in Mr. Sass whatever as far as we are concerned."

"Officers of steam boats will confer a favor by sending to us direct for exchanges, as we are under the impression that those to them, through this small individual, have frequently missed their direction."

The only ground of action upon the above words is the pecuniary damage resulting from their publication, which must be specially averred and proved, and proved as averred.

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The plaintiff, in his declaration, has elected to state that the words were published of and concerning him in his trade and business as steam boat agent; and is not, therefore, at liberty to give the case any other direction. The identicible thing that a party says has injured him, and for which he seeks damages by suit, and the manner in which he hath been injured, is conclusive upon him when he seeks redress pecuniarily. But if the foregoing proposition is not true, there is nothing in the words published which makes them actionable in any case or under any classification of the law concerning libels.

The words do not charge the commission of any crime.

The words do not hold up the party to infamy, scandal or disgrace.

The words do not relate to plaintiff in his capacity as steam boat agent, but are only applied thus by innuendo, and this is a misapplication, for it nowhere appears in the declaration or in the evidence, that it was any part of the duty of a steam boat agent to carry newspapers from or to boats.

As far then as in the publication the words steam agent are used, they are only *descriptio persona*.

The case stands as if the words charged were spoken of R. F. Sass, without naming him as steam boat agent; and they neither charge the commission of a crime, nor hold him *up to scorn, &c.*, and there being no proof of special damages, or any injury sustained thereby, the judgment of the court below should be reversed.

An innuendo cannot give a different meaning to the words than what they import themselves, its office being only to apply the words, and as the statement in the declaration. That they charged him with being an unfaithful steam boat agent is not supported, because there is neither proof or allegation that the matter complained of by the defendants below, had any connection with such agency.

The reasons given for the motion in arrest on page 30 of the record, embrace the correct doctrine of law and rest also on facts in the declaration.

The defendants below had a right to protect themselves by way of the publication, and they had a right to say they desired their friends to take another course in the matter of exchange papers. There was no other way from the character of the business and the object to be effected than to publish what they did.

The cases cited by the counsel for Sass have no application. They all tend to show that words are libellers which hold a man up to scorn and ridicule, and on this point the law is well settled.

But mark, this case goes upon the ground of pecuniary loss in the matter of the trade and business of a steam boat agent, and no special averment of damages, no pointing out what boats dropped him as agent, and no proof that any did, and no proof that he was ever injured at all. Therefore the judgment below should be reversed.

It is said in Holt on Libel, page 218: "But words not actionable in themselves did not become actionable when spoken of a man in his trade, unless it were shown by averment that they touched him therein." Ray, 75.

HUDSON for appellee.

1. The publication on which this action is founded is libellers *per se*. In the case of the people vs. Roswell, 3 John. Cas. 354, a libel is defined to be a "censorious or ridiculing writing, picture, or sign made with a mischievous and malicious intent towards government, magistrates or individuals." It is enough if the publishers induce an ill opinion to be held of the person named, or to make him contemptible or ridiculous. Any written slander, though merely tending to render the party subject to disgrace, ridicule or contempt is actionable, though it do not impute any definite crime. This doctrine has been fully established by re-

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peated adjudications. In the case of J. Fennimore Cooper vs. Greely, 1 Den. Reps. 347, the whole law of libel is ably discussed, the authorities reviewed and the principle laid down in Croswell's case recognised and approved. It is contended that the publication in this case comes within the rule above laid down. The defendant in error is charged to be an "impudent fellow, a small individual as having been unfaithful in his business and unworthy of confidence," &c.

2. The counsel for plaintiffs in error contends that the publication is not concerning the defendant as "steam boat agent," but merely as a private individual, and therefore is not libellous, there being no charge of crime, &c. This position, it is contended, is not in accordance with law, or the decisions of the courts of this country on that point. 1 Den. Rep. 362. It seems to be well settled, that where a person is named in a publication, or writing, and his trade, business or calling be given in connection therewith, the law will intend that the same was of and concerning him in the trade, business or calling designated, and the publishers will be estopped from saying that the person slandered was not of the trade, business, &c., mentioned in the libel. 2 Starkie on Ev. 859; Cook on defamation, 26, 27. Whether the words were published of the defendant in error in the capacity of steam boat agent, or in relation to his business, was a question of fact for the jury. Skinner vs. Grant, 12 Verm't. 456; 2 vol. Sup. to U. S. Digest, 321; 2 Lord Raymond, 1480; Cook on Def. 25, 27; 7 Mason & Welsby, 422-3; 1 Denio R. 361.

3. Any publication calculated to injure another in his trade, &c., is libellous of itself. In this case there is a charge that the defendant in error is an impudent fellow. This is certainly calculated to injure him in his business. No man would be likely to employ an impudent agent, if it could be avoided, to transact business for him, when his success depended alone upon public patronage. The publication also charges that the defendant in error is not a man in whom confidence can safely be reposed, and insidiously insinuates that he had been guilty of a breach of confidence, &c. Nothing could be better calculated to injure him in his calling than an imputation of this character. The very nature of his employment is such as to require strict integrity, promptness and fidelity in the discharge of business entrusted to him.

As to what will be considered as amounting to a libel, when spoken of a person in relation to his trade, calling or business; 2 Starkie on E. 866; 3 Wilson's R. 186; 17 John R. 217; 2 Wheaton Sel. 531; 7 Cowen Rep. 654.

4. In the case of Johnson vs. Robertson and wife, 8 Poters Ala. R. 486, the court held that in actions for slanderous words, the measure of damages is the extent of the injury received; but this the plaintiff is not bound to prove. When words are actionable in themselves, the right to damages follows as a consequence from the speaking of the words; because it is the inevitable tendency of slander to injure the person slandered in his trade, business, &c. It would frequently be difficult to prove any pecuniary loss from the slander, and always impossible to establish its full extent; besides the action is allowed not only to compensate for pecuniary loss, but to afford some redress for wounded feelings or prostrate reputation. Therefore where the words are actionable in themselves the law implies damages. Special damages need not be laid where words are actionable in themselves. The argument in the case above referred to, applies with great force, and is peculiarly apposite to the case now under consideration. It may well be asked, how the defendant in error could have proven the amount of his pecuniary loss; or the injury resulting from the libel in question? It cannot reasonably be supposed that those who may have declined employing the defendant in error, in consequence of the publication, would communicate to him the reasons for not entrusting business to his care. 2 Starkie on Ev. 861; 2 Wheat. Sel. 431; 4 Pike, 110; Sedgwick on Measure of Damages, 39, 40, 41.

5. The court in the case of Cooper against Greely, 1 Den. Rep. 363, say, any publications which derogate from the character of an individual by imputing to him either bad actions or

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vicious principles, or which diminish his respectability and abridge his comforts, by exposing him to disgrace and ridicule, are actionable without proof of special damages, in short that an action lies for any false, malicious and personal imputation, effected by such means, and tending to alter the party's situation in society for the worse. Any words written and published, throwing contumely on a person, or prejudicing him in his employment, are actionable without alleging special damages. Ob. vs. Finn, 4 Pike, 110; 2 Vol. Sup. to U. S. Dig. 321.

6. Other libels than the one declared on may be given in evidence at the trial for the purpose of showing malice. 2 Starkie Ev. 869.

Judge RYLAND delivered the opinion of the court.

The appellee, Richard F. Sass, brought his action against the appellants, Keemle & Field, in the St. Louis court of common pleas, for a libel published by them against the plaintiff. The plaintiff below had a verdict and judgment for one hundred dollars, and the defendants below bring the case here by appeal.

There being no statement by the counsel of the facts and points relied upon, either for reversal or affirmance of this judgment, I must state the facts from the record, and give my opinion of them as they appear therefrom, and of the law arising thereon. The plaintiff's declaration at first contained but two counts. The defendants demurred to the declaration, and the court sustained the demurrer to the first count and overruled it to the second count.

The defendants then obtained leave to plead, and filed their plea to the second count of this declaration. This suit was brought to the February term of the court in the year 1848, and at that term the defendants demurred and afterwards plead as above stated. At the same term the plaintiff obtained leave and filed his amended declaration containing two additional counts. And at the September term of the court the trial was had in the same year, and the verdict and the judgment for the plaintiff. The bill of exceptions in this case shows the following motion: "And now the defendants, by Leslie & Lord, come and move the court for a new trial for the following reasons:

1st. Because the verdict of the jury is against the evidence, and against the weight of evidence.

2nd. Because the verdict of the jury is against the law and evidence.

3rd. Because the court refused to give instructions asked by defendant.

4th. Because the damages in the verdict are excessive, not warranted by the proof.

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This motion was overruled and the opinion of the court excepted to, and this action of the court is one of the errors assigned for the reversal of this judgment. I will, therefore, now dispose of it. The bill of exceptions no where shews that any instructions were asked for by either of the parties. The evidence set forth in the bill of exceptions I consider sufficient to maintain the action, and there is nothing in the last reason assigned, that is, the excessive damages. There is no error then in the court below in overruling the motion for a new trial. The other motion is in arrest of judgment, and the following reasons are assigned in its support: 1st. Because the declaration is informal and insufficient in law, and therefore no judgment can be rendered thereon, and for particular cause of arrest the said defendants set down the following: The declaration contains no colloquium or special averments, that the words published related to or were spoken of and concerning the plaintiff in his trade and business as a steam boat agent. 2nd. The declaration contains no words averred to have been written and published by defendants that are actionable. 3rd. Each count in the declaration goes for special damages, and contains no certain specification of the amount, by and through what persons or facts the same were sustained. 4th. Because the said declaration, and each count thereof, is in other respects defective and insufficient in law.

This motion was overruled, and the opinion of the court was excepted to, and is assigned as one of the errors relied on for the reversal of the judgment. This I consider the principal error assigned, and upon its disposition depends the judgment of this court.

The libelous words charged in the declaration as published by the defendants in their newspaper, "The Daily Reveille," against the plaintiff are the following, stript of all inuendoes:

"R. F. Sass, steam boat agent, this impudent person withheld from us on Saturday, New Orleans papers of a late date, entrusted to him for this office by the clerk of the Lucy Bertram. We desire our steam boat friends hereafter to retain favors intended for the Reveille in their own hands until called for, as we put no trust in Mr. Sass whatever, as far as we are concerned. Officers of steam boats will confer a favor by sending to us direct for exchanges, as we are under the impression that those to them through this small individual have frequently missed their direction."

Are these words when falsely and maliciously printed and published of a person, actionable as a libel? And has the plaintiff declared upon them in such a manner as to justify the courts in sanctioning his action?

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As to the first question, I am satisfied beyond a doubt that such a publication of them as the question implies is actionable.

In the case of Nelson vs. Musgrave, decided by this court and reported in vol. 10, page 648, the court adopts the language of Judge Parsons in the case of the Commonwealth vs. Clapp, 4 Mass. Rep. 168. That distinguished jurist defined a libel to be "a malicious publication expressed either in printing or writing, or by signs or pictures tending to blacken the memory of the dead or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule."

In McCorkle vs. Binns, (5 Benning's Rep. 349) chief justice Tilghman says, "The distinction between slander by words and by printing or writing, is so well known that it is unnecessary to dwell on it. Suffice it to say, that any malicious printed slander which tends to expose a man to ridicule, contempt, hatred or degradation of character, is a libel." Justice Yeates in the same case observes, that "any printed publication that tends to bring a man into disrepute, ridicule or contempt, is a libel in a legal sense." This definition is not less applicable, when the suit is brought by a party injured than when a public prosecution is instituted. Stow vs. Converse, 3 Con. Rep. 341; Clark vs. Binney, 2 Pick. Rep. 115; Southwick vs. Stevens, 10 Johnson Rep. 443; Steele vs. Southwick, 9 Johnson Rep. 214; Thomas vs. Croswell, 7 Johns. 264; Walker vs. Winn, 8 Mass. Rep. 248; Cooper vs. Greely, 1st Denio's Rep. 347; the People vs. Croswell, 3 Johns. cases, 354. Any written slander, though merely tending to render the party subject to disgrace, ridicule or contempt, is actionable, though it do not impute any definite crime. The publication made in this case by the appellants against the appellee, is fully within the principle contained and supported by the above authorities, and without any authority, were it a new case, I am prepared to say, in my opinion, that such a publication is actionable, and that when falsely and wickedly, and maliciously made, inflicts an injury which the courts and juries of the country should redress by ample pecuniary remuneration. The good of society, the public peace, good morals, the usefulness and liberty of the press itself, require this course to be taken by the courts and juries. The freedom and liberty of the public press will be always promoted and maintained by restraining its licentiousness —"ut vivas, igitur, vigila."

It remains now to be seen whether the appellee has so declared upon this publication as to sustain the action. For this purpose it is only necessary to insert herein the amended declaration, which is as follows: "And the said plaintiff, leave of the court being first obtained, comes

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and by Hudson, his said attorney, further complains of the said Charles Keemle and Joseph M. Field, the said defendants in this cause. For that, whereas the said plaintiff was, and is now, a good, true, honest and just citizen of the county and State aforesaid, and has not ever been guilty, or until the time of the committing of the several grievances by the said defendants, as hereinafter mentioned, been suspected to have been guilty of the offences and misconduct hereinafter mentioned, to have been charged upon and imputed to him the said plaintiff, or of any other such offences and misconduct, but that before and at the time of the committing the grievances hereinafter mentioned, the said plaintiff used, exercised, and carried on the trade, occupation, and business of steam boat agent, and had always conducted himself in his said trade and business of steam boat agent, in an honest, upright, fair and honorable manner, and was honestly acquiring great gains and profits in his said trade and business. Yet the said defendants well knowing the premises, but wickedly and maliciously intending to injure the said plaintiff, and to cause it to be suspected and believed that the said plaintiff had been and was guilty of the offences, misconduct, and unfairness herein-after mentioned, to have been imputed to him on the 23rd day of November, in the year of our Lord 1847, at St. Louis, in the county aforesaid, the said defendants falsely, wickedly and maliciously, did compose, print and publish, and cause to be composed, printed and published, in a certain newspaper edited, owned and published by said defendants, called "The Daily Reveille," of and concerning the plaintiff, and of and concerning him, in relation to his said trade and business aforesaid, cer-tain other false, scandalous, malicious, defamatory and libellous matters following of and concerning the said plaintiff, and of and concerning him in his trade and business aforesaid, that is to say, R. F. Sass, (meaning the said plaintiff) steamboat agent, this impudent person, (meaning the said plaintiff) withheld from us (meaning themselves the said de-fendants) on Saturday last, meaning the Saturday next before the said 23rd day of November, A. D. 1847, New Orleans papers (meaning newspapers) of a late date, entrusted to him, (meaning the said plaintiff) for this office (meaning for the office aforesaid, The Daily Reveille) by the clerk of the Lucy Bertram, (meaning the clerk of the steam boat Lucy Bertram) we (meaning themselves, the said defendants) desire our steam boat friends, (meaning the steam boat friends of said defendants) hereafter to retain favors (meaning newspapers) intended for the Reveille (meaning the said The Daily Reveille) in their own hands (mean-ing in the hands of the steam boat friends of said defendants) until called

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for, as we (meaning themselves the said defendants) put no trust in Mr. Sass (meaning the said plaintiff) whatever, as far as we (meaning themselves the said defendants) are concerned. Officers of steam boats will confer a favor by sending to us (meaning themselves the said defendants) direct for exchanges, (meaning for newspapers) as we (meaning themselves the said defendants) are under the impression that those (meaning newspapers) sent to them (meaning officers of steam boats) through this small individual, (meaning the said plaintiff) have frequently missed their (meaning said newspapers) direction; meaning thereby that the said plaintiff was an impertinent person, an unfaithful, dishonest and unfair steam boat agent, and unworthy the confidence of the community, and that he, the said plaintiff, was unfair, unfaithful and dishonest in his trade and business of steam boat agent as aforesaid. By reason of the committing of which last mentioned grievances by the said defendant, as aforesaid, the plaintiff was greatly injured in his said good name, fame and credit, and in his said trade, occupation and business, and has, by reason of the premises, been injured, and has sustained damages in the sum of two thousand dollars. And whereas the said plaintiff before and at the time of the committing of the grievances by the said defendants, as hereinafter mentioned, was a steam boat agent and the trade and business of steam boat agent, then exercised and carried on, to wit: at St. Louis, in the county aforesaid. And whereas the said plaintiff hath not ever been guilty, or until the time of the committing of the said several grievances by the said defendants, as hereinafter mentioned, been suspected to have been guilty of the offences and misconduct, as herein-after stated to have been charged upon and imputed to him by the said defendants, or of any other such offences or misconduct. And the said plaintiff hath always exercised, and conducted, and carried on, and still doth exercise, conduct and carry on his said trade and business of steam boat agent with promptness, integrity, fidelity and fairness, by means of which said premises, the said plaintiff before the committing of the said several grievances by the said defendants, as hereinafter mentioned, had deservedly obtained the good opinion, confidence and credit of all his neighbors, and of divers steam boat captains, officers and owners of steam boats, and was daily and honestly acquiring great gains and profits in his said trade and business of steam boat agent, and to the comfortable support of himself and his family, to wit, at the county aforesaid. Yet the said defendants well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving and wickedly and maliciously intending to injure the said plaintiff in his said good name, fame and credit, and to bring him into public infamy,

KEEMLE & FIELD vs. RICHARD F. SASS.

scandal and disgrace, and to injure, oppress, and wholly ruin him in his said trade and business aforesaid heretofore, to wit, on the 27th day of November, in the year of our Lord 1847, at St. Louis, in the county aforesaid, falsely, wickedly and maliciously, did compose and publish, and caused to be composed and published of and concerning the said plaintiff, and of and concerning him in his said trade and business aforesaid, a certain other false, scandalous, malicious and defamatory libel, as follows, that is to say, R. F. Sass (meaning the said plaintiff) steam boat agent, this impudent person (meaning the said plaintiff) withheld from us (meaning themselves the said defendants) on Saturday last, (meaning the Saturday next before the 27th day of November, A. D. 1847,) New Orleans papers (meaning newspapers, published in New Orleans) of a late date entrusted to him (meaning the said plaintiff) for this office, (meaning the office of said The Daily Reveille) by the clerk of the Lucy Bertram, (meaning the clerk of the steam boat Lucy Bertram) we (meaning themselves the said defendants) desire our steam boat friends (meaning the steam boat friends of said defendants) hereafter to retain favors intended for the Reveille (meaning the said The Daily Reveille) in their hands (meaning in the hands of the steam boat friends of said defendants) until called for, as we (meaning themselves the said defendants) put no trust in Mr. Sass (meaning the said plaintiff) whatever, so far as we (meaning themselves the said defendants) are concerned. Officers of steam boats will confer a favor by sending to us (meaning themselves said defendants) for exchanges, (meaning for newspapers) as we (meaning themselves said defendants) are under the impression that those (meaning newspapers) sent to them (meaning to the officers of steam boats) through this small individual (meaning the said plaintiff) have frequently missed their (meaning newspapers) direction. By means of the committing of said last mentioned grievances by the defendants as aforesaid, the said plaintiff has been and is greatly injured in his said good name, fame and credit, and in his said trade and business, and has, by reason of the premises, last aforesaid, been injured, and has sustained damages in the sum of two thousand dollars: therefore he brings his suit, &c."

The declaration I consider sufficient to support the judgment. I, therefore, find no error in the court below in overruling the defendants motion in arrest of judgment. From all that appears to this court then; from the record and proceedings below, I can find no good and sufficient cause why the judgment should be reversed. And my brother judges agreeing with me in the opinion, the judgment of the court of common pleas is affirmed.

STEAM BOAT LEHIGH vs. RICHARD F. KNOX & MILTON KNOX.

STEAM BOAT LEHIGH *vs.* RICHARD F. KNOX AND MILTON KNOX.

Persons who furnish supplies to a boat, are not bound to inquire whether the master or agent who has actual possession of it, is legally entitled to such possession, in order to secure a lien.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

HESLEP & GARLAND, for appellant.

The verdict is against the evidence rendered in said case ; and also, that the evidence does not support the verdict ; that all the allegations required to be set out in a complaint against a boat, are material allegations, and require strict proof. Revised statutes, act boats and vessels, sec. 4 page 182.

The appellant was entitled to the instructions asked as set out in the bill of exceptions—a contrary doctrine would tend to the most enormous fraud—the remedy being special and extraordinary. The proof as to the master sworn to in a steam boat must be *stricti juris*. The instruction asked was a legitimate instruction under the statute. Rev. stat. boats and vessels p. 182 sec. 4.

The appellant was entitled to the benefit of the testimony of E. R. Dodge—that his examination on his —— discloses no fact to disqualify him as a witness ; that his statements were mere legal conclusions, and that nothing is shown in his examination that definitely determines his intent.

The appellant insists upon his right to show a tortuous possession at the time set out in appellees complaint, for surely a boat is not liable for accounts made by persons without authority to contract for her, more especially where notice—where notice to, and collusion exists between the parties, and the party furnishing supplies the appellant, sustains itself in this proposition by whole tenor scope of the statutes, in relation to boats and vessels, particularly the 4th section thereof.

KNOX & WHITE, for appellees.

This is an action instituted in the St. Louis court of common pleas to recover for supplies furnished said boat by the plaintiffs. There is no question raised by the record—that the supplies were furnished, the only two errors assigned are,—

1st. The court excluded evidence offered by the defendant.

2d. The court refused the instruction asked by defendant.

To the first error assigned the plaintiffs reply, that the defendant has not preserved the evidence excluded in his bill of exceptions, and this court will not therefore take upon itself to decide that the court of common pleas erred in excluding the evidence. 7 Mo. Rep. page 4; 5 Mo. Rep. 110; 4 Mo. Rep. 626, 564; 3 Mo. Rep. 487, Bartlett *vs.* Draper.

To the second error assigned the plaintiffs submit, that the court of common pleas did not err in refusing the instruction. 1st. Because it was not necessary for the plaintiffs to prove that A. B. Roff, as master of said boat, made the contract with said plaintiffs. 2d. If it were necessary for the plaintiffs to prove that the contract was made with the master of said boat, the plaintiffs submit that if the supplies were delivered by the plaintiffs to the boat, this is of itself presumptive evidence that the master of the boat contracted for the same. 3d. If the instruction asked intended only to require the court to instruct the jury that it was necessary for them to find that the contract was made with A. B. Roff, it is too comprehensive, and if given would have misled the jury.

STEAM BOAT LEHIGH vs. RICHARD F. KNOX & MILTON KNOX,

Judge NAPTON delivered the opinion of the court.

The cause of action against the steam boat "Lehigh" is stated to be "for stores and for supplies furnished for the use of said boat, and accrued on account of Roff, master." The bill of items consists of provisions and groceries, and some blank books. The verdict was for the plaintiffs, and judgment was entered against the principal and securities on the bond under which the boat had been released.

The defendant offered in evidence, certain records from the circuit court of Peoria county Illinois, which were objected to as incompetent and irrelevant. The object of the testimony was stated, in the bill of exceptions, to show the legal control and custody of the boat as being in certain receivers appointed by the Peoria court, thereby showing through whom the account sued on, was contracted, the boat was in the wrongful possession of the officers thereof—and that the plaintiffs had notice of this fact. This defence was excluded.

When the case was submitted to the jury, the court was called upon by the defendant to instruct the jury that "to entitle the plaintiffs to recover, they must show on whose account, and at whose instance the same accrued, and that said person was authorized to act for said boat." This instruction was refused.

The principal ground upon which the reversal of the judgment is asked, is found in the position taken in the defendant's instruction, and in the refusal of the court to give that instruction or to admit testimony offered to sustain the same line of defence.

The instruction assumes the law to be, that persons furnishing supplies to boats or their masters, must at their own peril, ascertain whether the master or agent who is actually in possession, and has control of a boat, is legally entitled to that possession and control. This proposition, we hesitate not to say, cannot be sustained. To impose such a burthen upon persons dealing with steam boats, would, in many instances, entirely frustrate the objects of our act for the more easy and speedy collection of demands of this character. It would require in many instances, an investigation into questions both of law and fact, which could not readily be made, and the necessity of such investigation would destroy all confidence in this kind of commerce.

The proposition of the defendant upon his offering certain records from Illinois, was placed on more plausible grounds than the instruction which was asked. The instruction placed the burthen of proof upon the plaintiffs, as a condition precedent to their recovery—the introduc-

STEAM BOAT LEHIGH vs. RICHARD F. KNOX & MILTON KNOX.

STEAM BOAT LEHIGH *vs.* RICHARD F. KNOX AND MILTON KNOX.

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STEAM BOAT LEHIGH vs. RICHARD F. KNOX & MILTON KNOX.

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The defendant offered in evidence, certain records from the circuit court of Peoria county Illinois, which were objected to as incompetent and irrelevant. The object of the testimony was stated, in the bill of exceptions, to show the legal control and custody of the boat as being in certain receivers appointed by the Peoria court, thereby showing through whom the account sued on, was contracted, the boat was in the wrongful possession of the officers thereof—and that the plaintiffs had notice of this fact. This defence was excluded.

When the case was submitted to the jury, the court was called upon by the defendant to instruct the jury that "to entitle the plaintiffs to recover, they must show on whose account, and at whose instance the same accrued, and that said person was authorized to act for said boat." This instruction was refused.

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The instruction assumes the law to be, that persons furnishing supplies to boats or their masters, must at their own peril, ascertain whether the master or agent who is actually in possession, and has control of a boat, is legally entitled to that possession and control. This proposition, we hesitate not to say, cannot be sustained. To impose such a burthen upon persons dealing with steam boats, would, in many instances, entirely frustrate the objects of our act for the more easy and speedy collection of demands of this character. It would require in many instances, an investigation into questions both of law and fact, which could not readily be made, and the necessity of such investigation would destroy all confidence in this kind of commerce.

The proposition of the defendant upon his offering certain records from Illinois, was placed on more plausible grounds than the instruction which was asked. The instruction placed the burthen of proof upon the plaintiffs, as a condition precedent to their recovery—the introduc-

STEAM BOAT LEHIGH vs. RICHARD F. KNOX & MILTON KNOX.

tion of the Illinois records admit the burthen of establishing the proposed defence, to be upon defendant—and the court excluded the defence, in both forms. Had the proposed defence gone further than it did, and included proof of actual fraud or collusion between the plaintiffs and the ostensible master of the steam boat, a very different question would be presented. Fraud will no doubt vitiate contracts with steam boats as well as with all other kind of contracts. But it was merely proposed to prove, that at the time of the supply of the articles by the plaintiffs to the steam boat, she was legally under the control of certain persons in Illinois appointed as receivers, and that the plaintiffs knew this fact.

This proposition is indefinite and vague. If it was designed to charge fraud and collusion upon the plaintiffs, it should have been so stated in plain terms. Fraud is not necessarily implied from a knowledge by the plaintiffs of claims to the possession of a boat existing in others than those who are in actual possession. Such conflicting claims involve legal questions, about which they may have formed very different conclusions to those reached by others. The law does not impose any obligation on them to enter into investigations of this character, and we do not imagine that this exemption will open the door to fraud. Fraudulent contrivances may always be detected and exposed in courts of justice, and the refusal of the court below to admit the kind of testimony on defence offered there, will preclude no one from showing actual fraud.

The bill of exceptions is supposed not to present the question, which we have examined—but we take this occasion to repeat, what has been heretofore often stated, that it is not necessary to encumber the record with long details of testimony, excluded not on account of any incompetency or informality, but upon the general ground that the defence designed to be sustained by it is unavailing. This position of the court admits the testimony to be otherwise unexceptionable, and brings up the point as to the legal efficacy or pertinence of the facts in the cause, and there is no necessity for spreading out upon the record the testimony offered in detail.

Judgment affirmed.

EDWARD D. EMERSON vs. JOSEPH BEAVAUS

EDWARD D. EMERSON vs. JOSEPH BEAVAUS.

In an action of trespass, under the statute, the judgment should be for treble the amount of damage assessed by the jury, unless it appears that the "defendant had probable cause to believe that the land on which the trespass is alleged to have been committed, or that the thing so taken, carried away, injured or destroyed, was his own."

ERROR TO PIKE CIRCUIT COURT.

BUCKNER, for plaintiff in error.

1st. It is submitted that the first count is based upon the statute. R. S. 1063 title trespass.

2d. It concludes, *contra formam statuti*, and in addition offence is brought within the terms of the statute. Lowe and Forsythe vs. Harrison 8 Mo. Rep. 850; 1 Chetty 356; Beekman vs. Chalmers 1 Cowen 585; 8 John 345.

3d. The verdict being found on this statutory count, the circuit court had no alternative, but to treble the damages, unless the evidence disclosed facts from which it could be inferred that defendant had probable cause to believe that the land was his own. Sec. 4 title trespass; George vs. Rook 7 M. R.; Beekman vs. Chalmers 1 Cowen 285.

4th. There is no pretence that the land was the defendants, or that he acted under this impression.

5th. The reason given by the circuit court, for not trebling the damages, that the defendant supposed he was cutting on public land, finds no countenance either in the letter or spirit of the statute.

PORTER, for defendant insists :

1st. That the count on which the verdict was found by the court setting as a jury, was not good as a count *under the statute*, because it is not averred in said count, that the defendant had no *interest or right* in the trees cut down and carried away, it may be that the defendant had no interest in the land trespassed upon, and still that he had an interest or right in or to the trees cut thereon. Lowe and Forsythe vs. Harrison 8 vol. Mo. Dec. p. 352, and it is averred only that he had no interest in the land, and not that he had no interest or right in the trees, of which the trespass is depicted. 1st count of plaintiff's declaration.

2d. Admitting that the count found for the plaintiff is good as a *count under the statute*. It is contended that the court below was warranted by the reason and spirit of the statute in rendering a judgment only for the damages assessed. It appears from the testimony that the defendant cut down and barked the trees on land of the plaintiff, believing that the same was public land, and therefore, that according to the custom of country, sanctioned by universal public opinion, he was doing no wrong. If the timber had been cut on public land—such as defendant was credibly informed and believed it to be—the defendant would have been a trespasser only against "Uncle Sam," and the timber or bark taken away would have been the defendants as against all the world, save the aforesaid liberal and lenient land-holder. The defendant admits that the case made out by the testimony may be within the letter, but insists that it is not within the reason and spirit of the "act to prevent certain trespasses; and that the same cannot be so construed as to subject the defendant to treble damages, without a violation of the maxim "*qui haeret letara haeret in cortice.*"

MAGOFFIN vs. MULDROW.

Judge BIRCH delivered the opinion of the court.

In this case, the circuit court put its declension to treble the damages which were found upon a statutory count in trespass "on the ground, and for the reason that from the evidence the defendant had probable cause to believe that he was cutting on public land, and not on private property, and therefore not within the spirit of the statute." We think otherwise, and that the only reason which should be entertained in extenuation of such a trespass, should be in the words of the statute—namely, that the land or the thing was "his own."

For this reason the judgment of the circuit court is reversed; and this court proceeding to render such judgment as the circuit should have given, directs its clerk to enter a judgment herein for the sum of twenty-four dollars, being treble the damages found in the circuit court.

MAGOFFIN vs. MULDROW.

Where an article of co-partnership has been obtained by fraud, and money paid upon it, the person defrauded may treat the article as a nullity, and recover his money on the common count, in assumpsit for money had and received.

ERROR TO HANNIBAL COURT OF COMMON PLEAS.

GLOVER & CAMPBELL, for plaintiff.

1st. That the article of co-partnership, and the sale of the lots in Marion city, were obtained by fraudulent representations on the part of Muldrow, and were null and void in law. Fraud violates all things. The argument which insists that the plaintiff should have sued on the covenants in the article, mistakes the position and case of the plaintiff; and would compel him to accept in lieu of his money the damages he has lost for not building a mill in that place upon the lands of third persons who might have held the improvements, and where the market for lumber was not such as by the improvement and prospects of the city he had the right to expect.

2d. Whether the contracts upon which the plaintiff had paid the defendant \$3333 33 cents had been obtained fraudulently or not, was a question for the jury, the decision of which the court improperly usurped.

3d. If they were fraudulently obtained, the action of assumpsit was well brought, upon notice

MAGOFFIN vs. MULDROW.

of the plaintiff that he disaffirmed them, to recover on the count for money had and received what the plaintiff had paid on the consideration which failed—the agreements which were read in Malone vs. Harris, this court held no demand was required. 6 vol. Mo. Dec. 451; 2 Tuck. Com. title assumpsit.

PRATT & REDD; for defendant.

The action should have been upon the contract, or an action upon the case. That if he relies upon any fraud, he should set out specifically the fraud.

That though fraud will vitiate all contracts, yet where the contract is lawful, that if any fraud is charged, the plaintiff must either bring an action to set aside the contract, or for the fraud. That such contract is not void for fraud, but voidable, and the same remains good until avoided or set aside.

That the plaintiff has no right to abandon the contract of partnership and sue for money had and received, the partnership being for a legal purpose. That there are no issues of fraud in the case to try from the pleadings.

Judge RYLAND delivered the opinion of the court.

The plaintiff, Magoffin, sued Muldrow in assumpsit, for money had and received, for money paid, laid out and expended &c., for money lent &c., and for interest.

The defendant filed non-assumpsit and set-off.

On the trial of the case the plaintiff offered in evidence an article of copartnership between himself and the defendant, under their hands and seals, stating that it had been obtained by fraud, and that he intended to prove that large sums of money had been paid by him to Muldrow upon this article. The plaintiff then offered evidence to show the fraud of Muldrow in obtaining the article, and to show large sums of money advanced to him by plaintiff under the article of copartnership.

The court rejected all the evidence offered by plaintiff, after the article of copartnership was exhibited, thereby preventing his proof of fraud, and also preventing the proof of the payment of large sums of money under the article by plaintiff to defendant.

The plaintiff excepted to the opinion of the court, in rejecting the testimony, took a non suit, and then moved to set the non suit aside; which motion was overruled—excepted to, and the plaintiff now brings the cause here by writ of error.

I am of the opinion that the court below erred in refusing to admit testimony to show the fraud and the payment of money under this article of copartnership.

Fraud vitiates the contract, and if the article was obtained by fraudulent representations—and money paid thereon by means of such

JOSEPH CHAMBERS vs. WILLIAM KELLY.

fraudulent acts on the part of the defendant; I hold it clear that the plaintiff had an undoubted right to treat this article of copartnership as a nullity, as an act arising "*ex dolo et malo*," and to sue in this form of action to recover the money paid by him to defendant, under this fraudulent article. The court then erred in not permitting the plaintiff's proof as offered; and its judgment is reversed—cause remanded, with directions to set aside the non suit, with leave to plaintiff to proceed with his action.

JOSEPH CHAMBERS vs. WILLIAM KELLY.

The sale of attached property by a sheriff under an order of a circuit judge in vacation, *prima facia* passes the title to the property to the purchaser, although the sheriff's return in the attachment suit is insufficient.

ERROR TO MARION CIRCUIT COURT.**GLOVER & CAMPBELL, for plaintiff.**

1st. Chambers having shown possession in himself, when the horse was forcibly taken from him by Kelley—must recover unless Kelly could show title in himself.

2d. The evidence showed no title in Kelly, the record of foreign attachment was and is a nullity. Rev. code 1835 p. 77 sec. 8, it must appear defendant's property has been attached. Cobeen vs. Douglass 1 Mo. Rep. 239; Anderson vs. Scott 2 vol. Mo. Rep. p. 15; Maulsby vs. Farr 3 Mo. R. 308; 5 Mo. R. 213—there was summons, here is no return—this remedy is construed strictly. Hand 94; 1 Wash. 355; 2 Ib. 350; 1 Mon. R. 108.

3d. If the conveyance to Chambers was fraudulent against the creditors of Longnecker, it could give Kelly no power to seize the property except by some proceeding sufficient to give him title.

4th. The court erred in not giving plaintiff instructions, and in not finding a verdict for him.

DRYDEN & ANDERSON, for defendant.

1st. The verdict is sustained by the evidence in the cause. That the pretended claim of title in the horse by Chambers, was a scheme contrived and concocted between Longnecker and Chambers, the latter being the mere cat's paw of the former—to hinder, delay, and defraud Kelly, a creditor of Longnecker, cannot be mistaken by any one who will read the evidence in the cause.

2d. The damages were nominal—one cent only—not excessive the assessed value of the horse was 600 dollars, and he was found to be worth at the time he was replevied 700 or 800 dollars.

JOSEPH CHAMBERS vs. WILLIAM KELLY.

See Anderson's evidence. The plaintiff did not except to the assessment of the value of the horse, but to the damages for the detention of the horse. The assessed value is one thing, and damages for detention is another. Rev. code 1845 p. 922 secs. 8 & 9.

3d. The measure of value in favor of Kelly is the value of the horse at the time he was replevied out of his possession. The defendant has his election to take the assessed value or the property. Re. code 1845 title replevin sec. 8 and 9; Sproule &c. vs. Ford 3 Lit. Rep. 29; referred to in 1st P. Digest 232 sec. 29; Parker vs. Simmons 8 Metcalf's Rep. 208.

4th. The first instruction asked by the plaintiff and refused by the court, was wrong, and ought not to have been given in this. 1st. That the title to personal property levied on process is not vested in the sheriff by means of his return on the process, but by means of the levy, if he make no return at all, yet if he seize the property, this vests in him the title from the time of the seizure on the process. The only question is, did he levy? 2d. When a sheriff is commanded by a writ of attachment to levy the property of the defendant on such writ, and by his return thereon shews that he "executed the attachment by attaching a grey horse, &c.," the presumption of law is that he attached the same "*as the property*" of him whose property he was commanded to attach, and not as the property of a stranger; and the presumption need not to be supported by any express statement in the return to that effect. The law presumes a compliance by its officers with all its requirements.

5th. The second instruction asked by plaintiff and refused by the court was wrong, and ought not to have been given in this. 1st. That the matters and things in the record of the attachment sent, were and are sufficient to divest the title of Longnecker and vest the same in Kelly as against Longnecker, and all claiming under him conclusively. 2d. That it calls upon the court to decide the sufficiency of said record to divest the title of Longnecker in the mass without directing the attention of the court to any point of objection. 3d. It assumes the proposition of law, which is false, that you may take the same objection to the proceedings collaterally, that you could do in a direct suit.

4th. The objection to the admissibility of the attachment, record in evidence, were rightfully overruled. 1st. The objections urged, if true, could not be taken advantage of in a collateral proceeding. 2d. The objection that the attachment issued before the bond was filed, is false, as proved by the record. See the record of the filings of the declaration, affidavit and bond. The dates of the bond and affidavit are apparently of the 12th Oct., but really of the 11th, having been changed at the time of execution from 12th to 11th. 3d. The second objection to the admissibility of said record in evidence, is answered in the answer to the first instruction asked by the plaintiff. 4th. The third and fourth objections are untrue. 5th. The third and fourth objections are not well made in this, that they do not direct the mind of the court to any particular irregularity or illegality. The court can't see the fault of which the objector complains. 6th. The proceedings in the attachment suit are binding on Longnecker, and all claiming under him until they are reversed.

7th. No irregularity or defect in the proceedings in the attachment suit after the sale of the horse to Kelly on the order of the judge of the court, (see the order and sheriff's return of sale) can effect the title of Kelly to the horse—this sale substituted the price of the horse for the horse himself in the hands of the sheriff. See secs. 40, 41 and 42, of the 1st article of the attachment law of 1835. Rev. code 1835 p. 81. After the sale, the title to the horse was independent of the result of the attachment suit.

Judge RYLAND delivered the opinion of the court.

This was an action of replevin commenced by Chambers in the Marion circuit court against the defendant William Kelly, for a horse called "Sir Kirkland," the horse was taken by the sheriff by virtue of the writ in the case, on the 3d of April 1843. At the August term

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1848, the case was tried without a jury, having been by consent submitted to the court, and a verdict was found for defendant, and judgment thereon.

To reverse the judgment, the plaintiff brings the case here by writ of error.

From the bill of exceptions, it appears that both plaintiff and defendant claimed the horse, under the same person, Longnecker. That defendant Kelly had previously to the commencement of this suit, sued the said Longnecker in attachment, and had attached the horse now in controversy, whilst the horse was in the possession of the said Joseph Chambers, the present plaintiff; that such proceedings were had in the attachment suit of Kelly vs. Longnecker, that the horse attached was sold by the sheriff under an order of the judge of the circuit court, in which the suit was pending in pursuance of the statute, and that Kelly, who was the plaintiff in the attachment suit, and is now the defendant in this suit, purchased the said horse at the sale by the sheriff, under the judges order as aforesaid.

The plaintiff, Chambers, claims the horse by purchase from Longnecker previous to Kelley's attachment. To support the present action, Chambers shewed that the horse was taken from his possession by the writ of attachment in favor of Kelley against Longnecker, and remained in Kelly's possession until he was replevined in the present action, and closed his case.

The defendant offered in evidence the transcript of the record and proceedings in the case of himself (Kelly) vs. Longnecker in attachment, under which and by virtue of the sale, he claimed property; and also offered evidence conducing to show that the sale from Longnecker to Chambers was fraudulent. The plaintiff objected to the introduction of the record in the attachment suit of Kelly vs. Longnecker in evidence. But the court overruled the objection, and admitted the evidence.

The following instructions were asked by the plaintiff, namely:

1st. "The plaintiff moved the court to decide, that if it appears from the record introduced in evidence in this cause, that the sheriff's return on the writ of attachment in the suit of Kelly vs. Longnecker, and does not show that the horse "Sir Kirkland" was seized under said writ as the property of said Longnecker, that the said return was and is sufficient to divest the property of said Longnecker.

2d. That the matters and things in the said record of the suit at law

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introduced by the defendant, are insufficient to divest the title of Longnecker, and vest the same in said Kelly.

3d. That if the evidence in this case, shews that the property in dispute belonged at first to Longnecker, and was by him sold to Anderson and Chambers, that Anderson sold his interest to Chambers; that Chambers should recover in this case if Kelly withheld possession at the commencement of this suit, unless it shall appear that the transfers to Chambers were intended to defraud the creditors of Longnecker, and that Kelly obtained the right of Longnecker by the proceedings in the suit at law."

The court refused to give the two first instructions, but gave the last; and this action of the court in refusing to give the first and second instructions, and in admitting the record of the attachment suit in evidence, are the errors relied on for the reversal of this judgment.

There is no error in admitting the record of the attachment suit in evidence in this case; the informality of the sheriff's return cannot effect the right of the purchaser of the property attached and sold under the order of the judge in vacation. It is not competent for third persons to come in and object in this oblique manner to imperfections and inconsistencies in a sheriff's return.

The sale of the attached property by the sheriff, under and by virtue of the order of the circuit judge in vacation, does *prima facia* pass the title of the property attached to the purchaser.

The court therefore committed no error in refusing the 1st and 2d instructions as asked for by the plaintiff.

The third instruction, which was given, put the case properly before the court, setting as a jury, and the evidence in my opinion amply sustains the finding of the court.

The court did properly overrule the motion for a new trial, and its judgment is affirmed.

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If a vendor uses means likely to impose on a person of ordinary prudence and circumspection, by throwing the purchaser off his guard on a point where he might reasonably place

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confidence in the representation made to him, and damages results to the purchaser, it is fraud. The inquiry as to the existence of such facts should be submitted to a jury.

APPEAL FROM THE HANNIBAL COURT OF COMMON PLEAS.

GLOVER & CAMPBELL, AND THOMAS SUNDERLAND for appellant.

The judgment should be reversed—

1st. Because the evidence shows no intentional and deliberative fraud practiced by the assignee of the note sued on, upon the appellant. First, by filing in the face of legal penalties a fraudulent plat; and secondly, by exhibiting that plat, and averring the ownership of all the lands covered by it, save where the reservations were marked upon it; and thirdly, by misrepresenting the location of the ice house, a material inducement to the purchase.

2d. That the appellant had the right to rely upon statements so solemnly made and so frequently repeated, both by record and verbal declarations, and held, the party legally responsible therefor, if ascertained to be false. If the appellant is to be held remissless in this case, because he trusted the declarations of the appellee, and did not measure and survey the whole ground, it is believed that fraud will generally go unpunished. Had the fraud been manifest to the observation of the purchaser, or fallen within the grasp of any of his senses as he passed over the ground? Was it evident that he could have discovered the falsity of his representations from any point at which he examined the tract, the court might well have told the jury to find against him. Had evidence of any sort been present to his mind, calculated to awaken suspicion of the verity of the representations? A case of *laches* might have been made against him; or had the opportunity of examination been immediate, as in case of goods sold in the absolute presence of the vendor, and not looked at by him, he might have been charged with wilful neglect. But this case is wholly different; none of these things occurring, the purchaser was required to doubt the truth of representations apparently fair, without any reason whatever, and without having any means of convenient and ready examination, to set about a laborious and tedious survey of Stout's addition to the town of Hannibal, which could not have been effected under several hours, perhaps half a day. It is believed that no case has been adjudicated requiring a party, under such circumstances, to question the good faith of another, or to suffer a serious loss for not resorting to care and diligence which nothing in the case suggested.

3d. The testimony in the cause does not convict the appellant of neglect of ordinary care and diligence, if in fact such was proper language in instructions to the jury. No man would have acted with more discretion or carefulness, conceding to the vendor ordinary sincerity. Where there is nothing to create suspicion, there is no imputing laches for reposing confidence.

4th. The defence was a bar to the action, if true; and the damages sustained by the appellant far exceed the debt.

MCDONALD for appellee.

1st. The plat marked A, and the deed from Stout to Griffith, clearly show that Lahenan was wholly mistaken in his testimony, in relation to the conversation which took place in his office at the time he drew the deed. The witness says he was informed by the parties, that they had traded with reference to said plat as the reservations appeared on it. Now there is not a single reservation upon it, as will appear by looking at it.

Again: The deed from Stout to Griffith expressly reserves Collins' 23 acres by the meets

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and bounds contained in Collins' deed from Wiley for the same, and yet Collins' 23 acres are not laid down or marked upon said plat. Mr. Lahenan's evidence upon this point, and it is the first one for the plaintiff in error to establish, is entirely destroyed by the plat marked A, and Stout's deed to Griffith, and which was drawn by witness, again Wiley's reservation of 5 acres is not marked on the plat.

2d. The evidence of Holliday shows that Griffith went upon the land, and accompanied the witness in surveying the same, that Griffith knew where the N. W. corner of Collins' 23 acres was, and that from thence he run the westerly line of said 23 acres along Collins' fence to point C., it being the S. W. corner of said tract as laid down on plat B.; from thence to point B. From all this it is reasonable to believe that Griffith did not purchase according to plat A.; nor did he confide in Stout's statements (if he made any) in relation to the location of any of the reservation contained in said deed.

Again: Holliday testified that after making said survey he calculated the quantity of land in said area, and deducted out the reservations named by the parties, and ascertained to their satisfaction the land Stout claimed in the tract. He also states that Collins' 23 acres was under fence. Let it be remembered that the calculation thus made upon the ground, in the presence of Stout and Griffith, and the field notes of said survey were handed to Lahenan to draw a deed by from Stout to Griffith. Can it be doubted that the bargain was then made, and made in accordance with said calculation and survey. Was there then any misrepresentation here, or fraudulent concealment on the part of Stout? Did Griffith confide for one single moment in any thing that Stout had ever said in relation to the boundaries of said reservation? Certainly not. He was upon the ground, saw the corners by the deed he received from Stout; he was referred to Collins' deed from Wiley for the number of chains and links, courses and distances, and acres of Collins' tract.

Griffith's conduct can only be accounted for in one of two ways. First: He must either have been looking forward to the distant day when this note should become due, and then set up a defence to the note for delay, and perhaps indulging the faint hope that the ability of his distinguished counsel, under the charge of fraud, would shield him from its payment. Surely it appears to me that Griffith must have had some such plan in his mind, or

Second. His careless indifference and total want of attention to those facts and means of information that were as much within his reach as they were to Stout.

I cannot believe that the law will aid him in a cunning and crafty shine on the one hand, or encourage his careless indifference to the ordinary means of information within his reach on the other. Story's equity, p. 217, 218; 2 Kents Com. p. 484; Moore vs. Turbeville, 2 Vol. B. 602.

3d. The question of fraud in this case, is purely one of fact, and was submitted to a jury whose province it was to pass upon that question.

Judge BIRCH delivered the opinion of the court.

Eby, assignee of Stout, sued Griffith on a note for \$379 28, being the last payment on a contract for the purchase of a quarter section of land, upon which was laid out an addition to the town of Hannibal, from which contract and sale, however, certain lots and parcels of land previously sold and disposed of were reserved. It was in evidence that during the negotiation between the parties, the vendor (Stout) represented that he owned all the town tract except the portions designated in the plat;

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whereas a subsequent survey demonstrated the fact to be that one of the reservations, supposed to be exclusively within the country portion of the tract, and not marked on the town plat, cut into it 2 23-100 of an acre. It appears, however, that the parties were upon the ground together; that the reservation alluded to was enclosed, and its locality as well as its area thus known to the purchaser. He did not, therefore, bargain for any land which he did not get, and with the localities of which his senses were not satisfied.

As to the conflict of the line of the reservation with the outer block of the addition to the town, whether the representation of the vendor was made in mistake, from a miscalculation of the extensions of the different surveys, both of which were before the parties during the negotiations; or, if not, whether the representation to the effect that they did not conflict, was so falsely and fraudulently made as to render the vendor liable as for a deceit, should have been left to the jury under proper instructions from the court. The rule is, that such means must have been used by the vendor as were likely to impose on a person of ordinary prudence and circumspection, by throwing him off his guard on a point where he might reasonably place confidence in the representation made to him, and which resulted to his damage. No such instructions having been asked or given, the one somewhat analogous to it which was given being susceptible of a construction which might imply the disregard of legal fraud when actually found to exist. The judgment of the court of common pleas is reversed and the cause remanded.

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1. Where a party is present at the taking of depositions, and makes no objection to the form of questions, it is too late to make them at the trial,
 2. Leading questions may be asked, in the sound discretion of the court, on a direct examination, where a witness is interested to defeat the party calling him, or manifests a disposition to evade questions, or appears reluctant and unwilling to give evidence.
 3. A bill of discovery may be read to a jury when offered merely as introductory to the answer.

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Plaintiff instituted suit, with process of attachment against A, and attached as his, certain property which was claimed by B, who interpleaded: defendant agreed with plaintiff that if he would permit the attached property to be delivered to B, to be sold, he would pay plaintiff the amount of the proceeds of the sale, or deliver to him similar property, in the event that the interpleader suit should be finally decided against B. Held—

- 1st. That to entitle plaintiff to recover upon this agreement of defendant, it was not necessary to prove that the property attached belonged to A; the determination of the interpleader in favor of the plaintiff, fixed defendant's liability.
- 2d. That although the defendant is a stranger to the interpleader suit, the record of it is proper evidence to show how it was determined.
- 3d. That it was not necessary for the plaintiff to aver or prove if averred, that the defendant had notice of the termination of the interpleader suit; nor to aver or prove a demand of the money or property: nor to aver or prove that the defendant had notice of the nett proceeds of the sale of the attached property, to enable him to recover.
5. In an attachment suit the return of the sheriff constitutes part of the record, and that error may be assigned in it.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

This was an action of assumpsit brought by Sproule and Agnew against the appellant Walsh. The declaration contained two special counts, and the common money counts.

The first count stated that on the 28th July 1840, Sproule and Agnew sued McNulty, Shaw and Mitchell, in the St. Louis circuit court by attachment, to recover the amount of \$3108 87. That the sheriff levied the attachment on 700 pigs of lead, as the property of the defendants in that suit, and that afterwards Crawford and Carson, of Baltimore, interpled in the suit, and claimed the lead as their property. That Walsh requested Sproule and Agnew to give up their right by attachment to the lead, and permit the same to be delivered up by the sheriff, and to be sent by the agent of the interpleaders to Baltimore, to be there sold and converted into money. That Sproule and Agnew yielded to this request, and in consideration thereof, Walsh promised them that if the said suit of Sproule and Agnew against McNulty, Shaw and Mitchell should be determined in favor of S. and A.; and if the aforesaid interpleader of Crawford and Carson should be determined against them, then Walsh would pay to S. and A. the nett proceeds of the sale of the lead. It was then averred that the suit against McN. S. & M. was determined in favor of the plaintiff and the interpleader against Crawford and Carson, and that Walsh had notice thereof, at the county of St. Louis, on the day and year last aforesaid. Also, that the 700 pigs of lead were sent forward to Baltimore, to Crawford and Carson, and there sold by them for the sum of \$1982 97, and that Walsh had notice thereof at said county on the 27th Oct. 1840. There was then an averment of the breach of the promise alleged.

The second count was substantially the same as the first, except that it stated that Walsh promised S. and A. that if the suit of S. and A. against McN. S. & M. should be determined in favor of said S. and A., and the said interpleader of Crawford and Carson against them, then said Walsh would produce and deliver to the sheriff of the county of St. Louis 700 pigs of lead to be substituted in the place of the 700 pigs sent to C. and C. at Baltimore, and to be sold by said sheriff under such process as might be issued in favor of said S. and A. against McN. S. & M.

On the trial of the cause the plaintiff offered in evidence the record of the case of Sproule and Agnew vs. McNulty, Shaw and Mitchell, to which the defendant objected, as being incompetent, on the ground that he was neither a party nor privy, but stood in the attitude of a stranger to the proceeding; but the court allowed the record to be read to the jury, and the defendant excepted.

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Previous to the trial, the plaintiff had taken and filed as evidence on his behalf, the deposition of Wm. Crawford, junior, made in the city of New Orleans: and in due time thereafter the defendant filed exceptions to the answers of the witnesses to the 11, 15, 18, 24, 25, 30, 31, 34, and 35 interrogatories, and also to the answers to all the interrogatories that are leading. The court below sustained the exceptions to the answers to the 11, 15, and 31 interrogatories, and to so much of the answer to the 34th, as to exclude the testimony of the witness as to his opinion of defendants liability. But the court allowed all the evidence of the deposition to be read to the jury and defendant excepted. And afterwards, when the deposition was offered in evidence by the plaintiff at the trial, the defendant again took the same exceptions, and with the same result. The plaintiff also gave in evidence another deposition of the same witness, previously taken and filed in the cause. He also offered to read in evidence the petition for discovery he had filed in the cause, and the defendant's answer thereto, conjointly, the petition not as evidence of itself, but only as introductory of the answers, and to show their relevancy and responsive character, but the defendant objected to the reading said petition in evidence, as being incompetent against him, and on the ground that it was but the declaration of the plaintiff made in his own favor. The objection was however overruled by the court, and the defendant excepted.

The plaintiff also gave in evidence the deposition of Thos. J. Carson and Wm. C. Crawford, and also an account of the sales of said 700 pigs of lead, showing the nett proceeds on the 27th Oct., 1840, to be \$1982 97. This account sales was admitted to be in the hand writing of the witness, Wm. Crawford, Jr., and on its being offered in evidence it was objected to by the defendant as being merely the admission of said Crawford, and therefore incompetent as against this defendant.

The record given in evidence by the plaintiff, as mentioned above, corresponded in all material points with that set out in the declaration.

There was no evidence before the jury that before the commencement of the suit, the defendant had any notice of the determination of the aforesaid suit of S. & A. vs. McN. S. & M., nor of the interpleader of Crawford and Carson for the lead attached therein. Nor was it shown that a demand was made upon the defendant Walsh before the commencement of this suit, for the nett proceeds of the sale of said lead, nor for the return by him to the sheriff of St. Louis county, of 700 other pigs of lead, to be substituted in place of the 700 pigs that had been sent forward to Baltimore.

When the case was submitted to the jury, the defendant prayed the court to give the following instructions to the jury:

1st. Unless the jury find from the evidence in the case that the 700 pigs of lead attached in the case of S. & A. vs. McNulty Shaw and Mitchell, was the property of the said McN. S. and M., they will find for the defendant.

2d. Unless the jury shall find from the evidence that before the commencement of this suit the defendant had notice of the determination and result of the interpleader of Crawford and Carson in the case of S. and A. vs. McN. S. & M. they ought to find for the defendant.

3d. Unless the jury shall find from the evidence that previous to the commencement of this suit, the plaintiff demanded of the defendant the nett proceeds of the 700 pigs of lead stated in the sheriff's return to have been attached in the case of S. and A. vs. McN. S. & M., they will find for defendant on the first count of the declaration.

4th. Unless the jury shall find that previous to the commencement of this suit the plaintiff made a demand upon the defendant to produce and deliver to the sheriff of the county of St. Louis 700 pigs of lead to be substituted in the place of the 700 pigs that had been sent to Crawford and Carson, they will find for the defendant on the 2d count.

5th. The court instruct the jury that there is no evidence before them that the 700 pigs of lead nor any other number were attached in said cause of S. and A. vs. McN. S. and M.

6th. The record of the case of S. and A. vs. McN. S. & M. given in evidence by the plaintiff, is not evidence that 700 pigs of lead were attached in said cause.

7th. Unless the jury find from the evidence that the nett proceeds of the 700 pigs of lead were

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made known to the defendant before the commencement of this suit, they will find for the defendant.

The court refused to give the foregoing instructions, but gave to the jury the following:

If the jury find from the evidence that the plaintiff attached certain lead as the property of McNulty Shaw and Mitchell, and that the defendant agreed with the plaintiffs that he would be responsible to them for the lead or the value thereof, in case they would suffer it to go forward; provided it should be determined that the said lead was subjected to said attachment, and that relying upon such promise, said plaintiff suffered the lead to go forward, and if the jury find also from the evidence that it was afterwards determined that said lead was subject to said attachment the defendant is liable.

To the refusal by the court to give the instructions prayed by the defendant, and to the giving the last named by the court, the defendant excepted. And afterwards the defendant in due time moved for a new trial, assigning therefor the ordinary reasons, including both the errors of law and fact, of which the defendant complained, which motion was overruled by the court and the defendant excepted.

POLK, for appellant.

1st. The common pleas court ought to have sustained the defendant's exceptions to the answers of the witness Crawford, taken in the city of New Orleans, to the 18, 24, 25, 30, and 35 interrogatories of the plaintiff. The said interrogatories are leading in their character, and the answers ought to have been excluded for that reason. 1 Stark ev. 149.

2d. The petition filed by the plaintiff for a discovery from the defendant, was incompetent evidence for the plaintiff. It is not only a statement made by the plaintiff, but it is made after the commencement of the suit, for the purpose of the suit, and of making a case for the said plaintiff. Nor was there any necessity for reading said petition in order to explain the answer of the defendant, said answer being responsive to the interrogatories addressed to the defendant, and fully explained by said interrogatories.

The great question in this case was whether the lead was released from the attachment of S. and A. upon the promise of Walsh to become responsible for it in case of the plaintiff's success in the attachment suit. Now, aside from the statement of Agnew in the petition for discovery, there is no position or direct proof of any such promise. There is nothing more than a few facts from which only the remotest inference of any such promise may be drawn. In such a state of case then, how dangerous was it to the interest of the defendant, Walsh, or how favorable to the success of the plaintiff, to allow the statement in the petition to be read.

3d. If the court below was right in refusing the first instruction asked by the defendant, then the plaintiff in this case would be entitled to recover against the defendant even though it should be shown that the lead attached belonged to another person than the said McN., S. and Mitchell the defendants in the case in which the same was attached. Or in other words, although they had attached lead that McN. S. & M. did not own, and to which therefore they could get no title by the attachment, yet they could recover from Walsh the value of the lead by allowing it to go forward to Baltimore.

4th. The plaintiff was not entitled to a verdict in this case without showing that the defendant had notice of the determination and result of the interpleader of Crawford and Carson in the case of Sproule and Angnew vs. McNulty, Shaw and Mitchell. There was no evidence before the jury under the common counts—no evidence of an account stated—nor of money lent and advanced—nor of money had and received—nor of goods, wares and merchandise sold and delivered. The real cause of action sued for, was set forth in the two special counts; and under those counts the testimony was offered.

Now notice is averred in both of these special counts, with time and place as a substantive, and

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material fact as much indispensable (as these counts show) to the plaintiff's recovery as any other averments contained in the counts, and being so averred, it was incumbent upon the plaintiff to prove them in order to a recovery. For the probata is always co-extensive with the allegation. 2 Tidds Proc. 734.

And sometimes averments that need not have been made, for the reason only that they were so made. 1 Chit. Pl. 319-20 side paging.

But in this case it was not only necessary to prove notice, because it was averred, but it was necessary to prove it in order for the plaintiff to show himself entitled to recover, and it was necessary to aver it in the declaration, in order that it should show a legal cause of action on its face.

By the very terms of the promise set up in the two first and special counts, there was no obligation or liability upon the defendant only upon the suit of S. and A. vs McN. S & M. being decided for the plaintiff, and the interpleader of Crawford and Carson being decided against them. And these were events not specially within the knowledge of the defendant Walsh, but on the contrary, especially within the knowledge of the plaintiffs Sproule and Agnew, because they were the parties plaintiffs in the case against McNulty, Shaw and Mitchell, and also parties in the aforesaid interpleader. In such case notice must be averred and proved. 16 Vir. ab. p. 5 pl. 12 & p. 6 pl 2; page 7 pl. 11; 1 Sand. Pl. & Ev. 132.

The necessity of proof of notice by the plaintiff, was expressly raised by the defendant's 2d instruction, and the 3d, 4th and 7th instructions prayed by the defendant, embody similar propositions. The 3d and 4th instructions confined the proposition expressly to the 1st and 2d counts.

Judge RYLAND delivered the opinion of the court.

The errors assigned in this case are as follows :

" 1st. The court of common pleas admitted illegal and incompetent evidence to be given to the jury by said appellees, notwithstanding the same was duly objected to by said appellant.

2d. The said court refused to give to the jury instructions prayed by the appellant, when by the law of the land said instructions ought to have been given by said court to the jury.

3d. The said court gave to said jury instructions which were illegal, and ought by the law of the land to have been refused.

4th. The said court overruled said defendant's motion for a new trial herein, whereas by the law of the land the same ought to have been sustained.

5th. The said court rendered judgment in the case for said appellees, whereas by the law of the land judgment ought to have been rendered for the appellant."

From the statement of the facts in this case, and from the errors assigned, it becomes necessary to look into the evidence as it appears from the record to have been given to the jury.

The main objection to the deposition of William Crawford, Jr., as appears from the record, consists in the leading character of the questions put to the witness by the plaintiffs.

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This deposition was taken in the city of New Orleans, and from it I find the defendant was present by his counsel, cross-examined the witness and made objections, but not in regard to the mode of asking the questions. No objection appears to have been made at the time of taking the deposition to the manner in which any question was put—some of these questions are what we call “leading questions,” but I am not disposed to find fault with the court of common pleas in its action in overruling the exceptions taken by appellant to these questions. From a careful examination of the deposition, I have no doubt that justice required leading questions to be suffered to be asked this witness. He is obviously an unwilling witness, and the officer before whom his deposition was taken would have acted properly in suffering leading questions to be put to this witness, and overruling objections to that effect, if any had been made. None were however made at the time. It is too late to except to these questions on the trial; and this court so decided in the case of Glasgow vs. Ridge & Allen, 11 Mo. Rep. p. 34. In the case of Sheeler vs. Speer, 3d Birney's Rep. 130, I find this point decided in the same way by the supreme court of Pennsylvania. In the case in Birney, the deposition contained the following questions: 1st. Did you not hear Mr. Sheeler say that he did not care the devil had the furnace, if he had his money, but that he was afraid he would never get his money? Ans.—Yes I did. Did you not hear Mr. Sheeler say, that in a few days, Mr. Speer would be broke up, and they were all working for nothing? Ans.—Yes, I did.” To this deposition the defendant's counsel objected, on the trial in the court below, because the questions were leading; the court permitted the deposition to be read, and signed a bill of exceptions, and this point came up in the supreme court. Chief justice Tilghman says: “The objection to the first interrogatory is, that it is a leading one, I do not think the question was properly put; but the defendant should have objected to it at the time; he was present and cross-examined the witness. If it had been objected to, it might have been waived—it was too late to make the objection at the trial.” In Woodman vs. Coolbroth, reported in 7th Greenleaf Reports 181, the same doctrine is held: “when and under what circumstances a leading question may be put, is a matter resting in the sound discretion of the court, and not a matter which can be assigned for error.” *Greenl. ev. sec. 435.* Leading questions are permitted to be asked on a direct examination, where the witness is interested to defeat the party calling him, or manifests a disposition to evade questions, or appears reluctant and unwilling to give evidence. There is nothing,

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then, in my opinion, wrong in the court below so far as respects the deposition of the witness, Crawford, taken in New Orleans.

To support his action, the plaintiff, to show the determination of the suit in his favor against McNulty, Shaw and Mitchell, and also the determination of the interpleader of said suit by Crawford and Carson claiming the attached property, in his favor; to do this, the record of the suit against McNulty, Shaw and Mitchell in favor of plaintiff, as also the record of the interpleader; that is, the record of the attachment suit and interpleader was not only competent evidence, but was indispensable evidence. The liability of the defendant depended upon the result of the issue made on the interpleader; and "thus the determination of the controversy became a part of the plaintiff's title," and in such cases the record is clearly competent evidence. 1 Greenl. ev. secs. 527, 538, 539; Lane adm'r. vs. Clark adm'r. 1 Mo. Rep. 657 (old edition.)

I find no error in the court below in suffering the bill of discovery to be read as it was done in this suit. It was not offered, nor was it received as any evidence, but was merely read as introductory to the answer, and was so declared at the time by the plaintiff's counsel, as appears from the bill of exceptions in this case. The bill and answer may be considered nothing more than the examination of the party as a witness. The bill of petition may be regarded as a mode of preponderating interrogatories, and is as pertinent and proper to be read as an interrogatory in a deposition—in neither case is any statement or suggestion of a fact evidence, but in both cases they are read merely as introductory to the answer.

The original account of the value of the lead admitted to be in the hand writing of Wm. Crawford, to whom the lead was sent by the defendant, might well be admitted. From Crawford's deposition it appears that there was an account of the sale of the lead showed to him, and by him stated to be correct. The bill of exceptions shews this to be the original account of the sale of said lead, in the hand writing of Wm. Crawford Jr., admitted indeed to be his hand writing. I see nothing wrong therefore in suffering it to be read to the jury. Indeed, I consider Wm. Crawford Jr., so far as the sale of this lead is concerned, as the agent of the defendant in this case. I have now disposed of the error first assigned, which relates to the incompetency and illegality of the evidence admitted by the court on the trial of this case below. I shall now consider the second and third errors assigned, which involve the correctness of the court in refusing the instructions

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prayed for by the defendant, and also in giving the instruction upon its motion, as appears from the bill of exceptions. The defendant's instructions appear in the statement of the case as above. As to the first instruction, the court committed no error in refusing it, because in this action it is no wise material to whom the lead belonged. The contract between plaintiffs and defendant does not make it a condition precedent that the lead attached should be the property of McNulty, Shaw and Mitchell ; but the liability of the defendant attached on the final determination of the issue on the interpleader. It was therefore not necessary for the plaintiff to aver that the lead was the property of the defendants in the attachment suit, nor was he bound to prove the lead to be theirs. The only fact on which the defendant Walsh's liability depended, was averred and was proved, namely, the determination of the interpleader against Crawford and Carson.

I will notice the 5th and 6th instructions next. I consider the record of the attachment suit evidence that the lead was attached—evidence of a high character. The return of the sheriff is part of the record—and this court has decided that mesne process, and the sheriff's return thereon, do constitute a part of the record, and that error may be assigned in them. 1 Mo. Rep. 336 (old edition) Cabeen vs. Douglass ; Ibid 534 Harrison, Green and Delany vs. the State. There is no error therefore in refusing these instructions.

I will now notice the 3d and 4th instructions. There is no averment in the first count of a demand of the nett proceeds of the sale of the lead, nor in the second count of other lead in substitution of that attached. I do not consider it necessary that any special request should have been averred in either count ; and if such be averred, I do not consider it necessary , in this case, to prove such request, neither from the contract nor the manner of declaring thereon. No error therefore in refusing these instructions.

I do not consider that there was any necessity for the plaintiff to aver notice to defendant of the termination of the interpleader ; and should there be such an averment in his declaration, I look upon it as mere surplusage, and not requiring proof 1st Chitty's plead. 232 ; 1st Saunders on plead. and ev. 130, 131, 132; 1st Chitty's ples. 320. Nor was it necessary that the plaintiff should aver that defendant had notice of the nett proceeds of the sale of the lead—and if such averment be made, I consider it merely as surplusage, and need not be proved. Under this view of the case, then, there was no error committed in re-

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fusing the 2d and 7th instructions; which disposes of all that were asked for by defendant.

It now remains for me to consider the instruction for the plaintiff, which the court gave of its own accord. This instruction simply informs the jury, that should they believe from the evidence, that the plaintiff has proved all the material facts of his case, stating them in the order in which they are averred in his declaration, he should have a verdict. I find no fault in the instruction, nor had the defendant any cause to complain of it. There is nothing, then, in the errors assigned, calling for the action of this court to reverse. I find no error in the refusal of the court to grant a new trial, or in giving the judgment for the plaintiff, upon the verdict of the jury. My brother judges concurring in this opinion, the judgment of the court of common pleas is affirmed.

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A sheriff's deed may be impeached and set aside for fraud, by a proceeding upon bill in chancery.

APPEAL FROM GASCONADE CIRCUIT COURT.

FRISSELL for appellant.

1. That there is no equity in the bill, and the demurrer should have been sustained. If the sale did take place on the 24th of September, when the land was advertised for sale on the 23d, and the sheriff in the recitals in his deed states that the sale took place on the 23d, the remedy of Moller was against the sheriff on his bond. If the recital in the deed be false, evidence is not admissible to controvert it, as between Moller and Teubner. Stat. of 1845, p. 484, sect. 49; Philip's evidence, (Cowen and Hill) part 2nd, 1086, 1087, 10945; 7 Mass. Rep. 382, 392; 13 ib. 483; 4 ib. 478; 9 ib. 95.

That even if the judgment was satisfied, still Teubner's title is good, unless he had notice of the satisfaction. In this there is no averment in the bill, Reed vs. Austin's heirs, 9th Mo. Rep. 721.

That Moller has no right to complain of the inadequacy of price; for by his own act he had

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embarrassed the title. At the time of the sale there were two deeds on record for those lots one from Moller himself, and another from the sheriff.

SKINNER for appellee.

1. A sale of real estate by a sheriff, made after the day to which the writ is returnable, is void and passes no title to the purchase. Simms vs. Randal, 2 Vol. Bay's Rep. p. 524; McFarland vs. Wilson, et al. 2 Vol. Smede's and Marshall's Rep. 269; 3 Smede's and Marshall's Rep. p. 468. Revised Statutes, 1835, title execution, sec. 39; also same statute for 1845, title execution, sec. 41.

2. A return of satisfaction on an execution, extinguishes the lien of the judgment upon which the execution issued, so that property subsequently sold under another execution on the same judgment, is not subject to it or bound by such sale. Parks vs. Person, 1 Smede's and Marshall Rep. 76.

3. When more property is sold under an execution than is sufficient to satisfy the execution, and the property could have been sold in parcels, the court will set aside such sale. 7 Mo. Rep. 346.

4. A direct application to the court by motion, and notice to the opposite party, &c., would not have sufficed in this case; because the deed purported that the sale took place on the 23d September, 1846, and in pursuance of the command of the writ, and in conformity to the advertisement; whereas, in fact, these recitations were false, but could not have been questioned in any collateral proceeding; but a bill in chancery to set aside said deed for the fraud, is the only and legitimate remedy.

5. And admitting that a motion in the manner aforesaid would have been a proper remedy, yet I contend that a bill in chancery is also a concurrent remedy; because fraud gives the chancellor jurisdiction in all cases, and the bill charges a fraudulent combination between the appellant and the sheriff, and as to whether this allegation was proven or not, this court will presume that the same was proven, as the evidence is not preserved in the record, in which case this court will presume that all things were proven which were necessary to have been proven in order to a decree in the court below.

6. That a bill in equity is a legitimate remedy in this case. 3 Chan. Rep. p. 57, 58, 22. Also a bill may be brought to set aside a conveyance by deed and fine, if indirectly gained. Woodhouse vs. Brayfield, 2 Ver. Rep. 307; yet it is a principle of law that there can be no averment in contravention of a fine, 5 Vol. Cruise, p. 80, sect. 60.

7. It is no objection that this bill was dismissed as to Wyatt at the return term, when there was a return of no service as to him and the appellant; because Wyatt had no interest or title in him to be affected, and because this cause is justified by statute, 1845, p. 838, sect. 16.

8. It is no objection that parol evidence was introduced to contradict the recitation in the sheriff's deed, that the land was sold on the 23d of September, 1846, because the bill charges fraud in the transaction, and this species of evidence was the only evidence that could have been adduced to prove that fact, since there was no record evidence; and in any other proceeding the recitals could not have been contradicted.

9. The decree cannot be reversed, because the evidence was not preserved in a bill of exceptions. Nor did the appellant move in arrest of judgment or for a new trial; nor did he ask any instructions in the case. If this proceeding by bill in chancery is not the remedy that should have been adopted, the appellant should have demurred; and if the court erred in overruling the demurrer after a decree, the appellant should have then moved in arrest; and if the court overruled the motion in arrest, then to have excepted, &c.

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ARROTT for appellee.

The suit was properly brought by bill in chancery.

On a bill brought in equity, charging fraud in sheriff's sale, the court entertaining the bill decreed a re-conveyance, &c. Viner's abridgment, title sheriff's sales.

It is no objection that parties to a fraud have their remedy at law; for in cases of fraud the court of equity has a concurrent jurisdiction with the common law, matter of fraud being the great subject of relief there. 2d Pierre Williams, 225; 7 Johnson's chancery Rep. 194.

Sheriff's sale and deed remedy of party injured by summary application to the court under whose process the officer acts, or by bill in equity. Jackson vs. Roberts, 7th Wendell R. 83.

Inadequacy of price, coupled with circumstances which show oppression, will be regarded as fraud, and entitle a party to relief in equity. Holmes vs. Frish, 9 Mo. Rep. 201.

Courts of equity in this State are not confined in their jurisdiction to cases in which adequate relief cannot be had at law. Clark and wife vs. Henry's adm'r.; 9 Mo. Rep. 339.

2d. That the evidence was properly admitted by the court below.

In courts of equity a distinction has been taken between evidence that may be offered to a jury and to inform the conscience of a court, viz: that in the first case no parol evidence could be admitted to control a deed: because the jury might be inveigled thereby, but in the second case it could do harm, because the court were judges of the whole matter, and could distinguish what weight and stress ought to be laid on such evidence. 2d Ver. Chan. 98; Harrison's Chan. Practice, Vol. 1, 543.

Equity relieves against mistake, as well as fraud, in a deed or writing, and parol evidence is admissible to prove the mistake, though it be denied in the answer. Gillespie vs. Moore, 2 Jon. Chan. Rep. 585.

3d. The decree rendered below is just and equitable.

No title vests in a purchaser when the sheriff acts without authority. Carter vs. Simpson, 7 Johnson's R. 535.

The latest period which the law allows for the return of an execution, is the day on which it is returnable. Vail vs. Lewis, 4 Jon's. Reps. 450. An execution cannot be executed after the day on which it is returnable. 2 Chan. Rep. 243.

A purchaser under persons authorized by statute to sell, is presumed to know the nature and extent of the authority, and purchases at his peril. Downing vs. Smith, 3 John. C. R. 332, 344.

Though a party has paid the purchase money, yet if he had not in fact paid it before notice, it is not sufficient to sustain the character of a bona fide purchaser for a valuable consideration without notice. Jewet vs. Palmer, 7 Johns. C. Rep. 65.

A court of equity will set aside a sale made under execution, when the sale is tainted with fraud or infected with other vices which render it inequitable that it should stand. Reynolds vs. Meyer, 1st Freeman's Chan. Rep, 462.

If property sold be not capable of delivery, the sale transfers to the purchaser. No title to the property sold, unless the officer in the levy and sale conform strictly to the requisitions of the law. 67 Mass. R. 240.

Judge BIRCH delivered the opinion of the court.

The bill in this case alleged a fraudulent combination between the sheriff of Gasconade and the plaintiff in error (defendant below) in the

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sale and purchase of certain real estate, under an execution against the plaintiff below, (appellee here) and prays therefor that the pretended sale be declared void, and the property re-conveyed to him.

The fraudulent collusion is alleged to have consisted in advertising the sale to take place on the 23rd of September, 1846, selling the property on the 24th, and making the return upon the execution and the recitals in the deed conform to the day of the advertisement, instead of the day of sale.

The sheriff was originally included as a party, but the bill was subsequently dismissed as to him, and a decree for re-conveyance entered against the other defendant.

As the testimony in the case, upon which the decree seems founded, does not appear in the bill of exceptions, the question presented by the demurrer is the only one properly before us by the record.

The statutory enactments, that the recitals in such a deed are to be regarded as "evidence of the facts therein stated," and the general doctrine that they cannot be impeached in a collateral proceeding by the defendant in the execution, deemed inapplicable in a case like the present. Here, fraud is the very gist of the action; and we cannot conceive a cause of proceeding better adapted, as well to redress the particular wrong complained of, as to remove all subsequent cloud from the title to an estate, alleged thus wrongfully to have been sold and deeded away, for a sum merely nominal in comparison with the real value.

The suit, therefore, seems to have been properly brought, and no reason appearing upon the record why the decree should be disturbed, it is affirmed.

LOVEL KNIGHTON vs. JOHN TUFLI.

1. An instrument of writing for the payment of a specific sum in property, is assignable under the statute.
2. The common law action of debt will not lie on an instrument of writing for the payment of a specific sum in property.

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APPEAL FROM WASHINGTON CIRCUIT COURT.

FRISSELL for appellant.

The appellant insists that the court erred in sustaining the demurrer, and that the judgment should be reversed.

The instrument is inartificially drawn, but it is manifest that by it the defendant is indebted to the plaintiff, and as it may be considered a note within the meaning of the statute, and as such assignable. It appears to be an attempt to combine a note as a mortgage in the same instrument. Both, or either, are assignable by statute. It is not, therefore, seen why a suit might not be brought in the name of the assignee.

This instrument contains the agreement of the parties, and is the only writing between them. Tufli is liable to pay, and the money or plank is coming to the plaintiff.

Neither the statute nor custom have established any particular form of a bond or note. The substance and legal effect of the instrument, must determine whether it be assignable or not.

COLE for appellant.

1. The plaintiff has misconceived his remedy.
2. The instrument sued upon is an equitable mortgage. *Davis vs. Clay, ex'r. 2, Mo. Rep. 161.*
3. This instrument is not assignable under our statute, so as to authorise an action by the assignee in his own name (6 M. R. 509, M. L. 190.)
4. The declaration is all. The plaintiff should have averred that the debt has not been paid to the assignor. (*Keeton vs. Scantland, Hardins' Reports, 149.*)
5. The instrument sued upon should be held a promissory note for property and assignable, then the common law action of debt is not the proper remedy, because the recovery in debt is in numero, and a judgment on a note for property could not be taken without a jury to find the damages.

Judge RYLAND delivered the opinion of the court.

This is an action of debt brought by Lovel Knighton against John Tufli on the following instrument of writing:

"Know all men by these presents, that I, John Tufli, have this day given Ammon Knighton a mortgage on the undivided half of a saw mill on Fouch and Renault creek, and do by these presents, grant and transfer to said Knighton all my right, title, interest and claim in and to said Mill, and all the tract of land belonging to said mill place, formerly the property of Knighton and Lyon. This lien is given for the purpose of securing payment of the sum of three hundred and twenty-seven dollars and fifty cents, which payment is to be made in plank or lumber made at said mill, to be due one thousand feet each week, said mill can

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saw. Said debt to be discharged by plank delivered at said mill, at the rate of twelve and a half cents for each quarter of an inch thick for any kind of plank. Witness my hand, this 6th day of Sept. 1842.

JOHN TUFLI."

"I do assign the within bond to Lovel Knighton for value received of him, as witness my hand, January 6th, 1843.

A. KNIGHTON."

The defendant craved oyer and demurrer to the plaintiff's declaration, setting out the instrument sued on as above.

The court sustained the defendant's demurrer, and gave judgment thereon for him. The plaintiff thereupon filed the affidavit, and prayed an appeal which was allowed him.

The only points calling for a decision of this court, are 1st. Is this instrument assignable under our statute? 2d. Will the common law action of debt lie on this instrument?

On the first point, I am of the opinion that the instrument is such a one as may be assigned under our statute.

On the second point, I am of the opinion that the common law action of debt cannot be maintained on this in this instrument. Sec. 1st, Bibb 356; Watson & McCall vs. McNainy, where the doctrine is fully examined. See also 3rd Missouri Reports, 16 Snell vs. Kerby.

Let the judgment be affirmed.

JOSHUA GENTRY, ADM'R. vs. JOHN McREYNOLDS, ADM'R.

The personal savings and profits made by the wife, and which her husband allows her to apply to her own separate use, in equity, vest in her as against the claim of her husband and his legal representatives.

ERROR TO MARION CIRCUIT COURT,

DRYDEN for plaintiff in error.

1st. Husband and wife are one in laws, and all compacts and agreements between them during coverture, are void at law. So of the agreement of Henry in this case, to permit his

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wife to make profit of his industry and the products of the farm. 1st Blackstone's Com. 442, 2d ib. 433; Co Sitt. 112 a, 187 b.

2d. Whatever may be the rights of the wife in equity to her earnings during coverture, they are at law the absolute property of the husband, and on his death pass to his administrator. 2d Bacon's abridgement, p. 27, and 8, title "Baron & Feme." D.; 3rd Bacon's abrid. p 65, title ex'rs and adm'r's., 4 H.

3d. If Mrs Henry had any right to the money now in controversy, it was an equitable right, and as such cannot be interposed as a defence to the legal right of the adm'r. If any right, she has her remedy in equity and not at law.

REDD for defendant.

The foundation of this action is an implied promise. To raise that implied promise, the plaintiff must prove that defendant has received money belonging to his intestate. Upon this evidence the law will imply the promise, unless the defendant can show that she had a legal or equitable right to retain it. Comyn on Contracts, 263, 266, or library edition, p. 316.

Money acquired by the wife during coverture, and held by her as her separate purse, with the consent of her husband, is her separate property, and she has an equitable right to retain it against her husband or his administrator. Slanning vs. Style, 3d Peire Will. 337, 338; Graham vs. Londonderry, 3d Atkins, 393, 394, 395, side page; Lucas vs. Lucas, 1st Atkins, 271, 272, side page; 1 Maddox Ch. 471, top page.

The equitable ownership of the wife is a good defence in this form of action, *money had and received*.

This defence is good at law; any defence will avail in this action which shows that the plaintiff is not entitled, *ex equo et bono*, to the whole or any part of this demand. Comyn on Contracts, 266 or 316; 2d Burrow's Rep. 1010; Moses vs. McFerlan; Dale vs. Sollett, 4th Burrow's p. 2134.

The very gist of this kind of action, is that the defendant upon the circumstances of the case, is *obliged by the ties of mutual justice and equity to refund the money*. 2d Burrow's Rep. 1012.

PRATT for defendant.

A husband may make gifts to his wife, and deal with her, and permit her to retain her earnings. &c.; 2d Story's equity, page 603, sect. 1375.

In the case of Slanning vs. Style, 3d Peire, Williams' Rep. page 337, the wife was allowed not only to keep the earnings, recognised the dealings of husband and his wife, and as he submitted to borrow of his wife 100 pounds, admitted it to be proved against his estate.

The husband could not sue the wife at law, nor could his administrator bring suit against her for the same cause of action.

The wife can retain gifts against all but creditors.

Judge NAPTON delivered the opinion of the court.

This was an action of assumpsit brought by the administrator of William Henry, deceased, against his widow, and upon her death revived against her administrator.

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It seems that Mrs. Henry, during the life time of her husband, had been permitted by him to dispose of the poultry, eggs, garden vegetables, &c., and retain the proceeds for her separate use. At the time of the death of Mrs. Henry, the money arising from this source amounted, according to some witness, to three, and according to others, to eight hundred dollars. The estate was a large one, and entirely out of debt, and Mrs. Henry retained the money as her own property. The circuit court who tried this case being of opinion that the claim was well founded in equity, and therefore a good defence to this action of Henry's administrator, gave judgment for the defendant.

The general and well settled rule undoubtedly is, that gifts from a husband to a wife are void at law. Courts of equity will, however, protect a class of gifts of a peculiar character, except against the claims of creditors. Personal ornaments and clothing, or money given to the wife to purchase them, and the personal savings and profits made by the wife in her domestic management, which her husband allows her to apply to her own separate use, have been held to vest in her against the claim of her husband and her legal representatives. 2. Story Equity and cases cited, sec. 1375. This equitable doctrine is applicable to the facts of the present case, and the defence set up was, in our opinion, available in the action of assumpsit.

Judgment affirmed.

WILLIAM HOLMES ET AL. vs. ALLEN A. HOLLOWMAN BY HIS NEXT FRIEND ROBERT T. EDMONSON.

1. If the witnesses who attest the execution of a will are competent at the time of the execution, a subsequent incompetency will not affect the validity or formality of its execution.
2. If heirs at law are subscribing witnesses to a will, but are not legatees or devisees under it, upon a proceeding to establish the will, if they refuse to testify upon the ground that they are parties to the record, other witnesses may be examined to establish it.

APPEAL FROM ST. GENEVIEVE CIRCUIT COURT.

FRESELL, for appellant.

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1st. The privilege of making a will is the creature of the statute, and unless the requisitions of the statute are complied with, the will is without effect.

2d. Our statute requires that the subscribing witnesses to a will should also attest to the soundness of mind of the testator. Wethinton vs. Wethinton 7 Mo. R. 589.

3d. A competent witness within the meaning of the statute is one not interested in the event of the suit, and such a one as by the rules of the common law could be compelled to testify. A party to a suit is always incompetent as a witness. Dickins vs. Hol. 7 Gill and Johnson 311; Philips ev. 72.

4th. A will cannot be established by other evidence than that of the subscribing witnesses, unless they are dead or out of the jurisdiction of the court. 1 Philips evidence (Hill and Cowen) 496.

In the probate of a will made in the circuit court, the subscribing witnesses must be examined unless they be dead, or cannot be found. Mo. stat. 1083 sec. 34.

FITZGERALD, for appellee.

1st. A legacy to an attesting witness of a will, is not void. Roscas ev. p. 75; 1 Stark ev. 324 and notes.

2d. If witnesses refuse to testify, the attestation may be proved by other testimony. 1 Stark ev. 324 and notes.

3d. If witnesses of a will be interested, on proof of that fact, other testimony may be offered to establish the will. 1 Starkie ev. 325, 328, 329 and notes; Revised statutes of Mo. p. 1081, title wills sec. 20.

Judge NAPTON delivered the opinion of the court.

This was a proceeding in the circuit court of St. Geneveive county, to establish the will of Elizabeth S. Holmes, probate of which had been denied by the county court of that county.

Richard M. Holmes and James W. Holmes were the attesting witnesses, and they were heirs at law to the testatrix. It appeared that by the will of Elizabeth Holmes, all her property was left to her nephew, Allen Augustus Holloman, a minor, by whose *prochein ami* this proceeding was instituted. The proceedings of the probate court, in relation to the will, which were read in the circuit court without objection, showed that the execution of the will was sworn to by both of the attesting witnesses, but one of these testified that the testatrix was of unsound mind.

Upon the trial of the issue, *devisant vel non* in the circuit court, the two subscribing witnesses to the will, who had been as heirs at law cited to appear, refused to testify. The court thereupon admitted other witnesses, who established the hand writing of the subscribing witnesses, and the hand writing and signature of the testatrix, as well as the facts, that the will was signed and attested by the testatrix, and the witnesses in the presence of each other, and that she was of sound

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mind. These facts were found by the jury upon instructions from the court.

The only points relied on in this cause are in relation to the admissibility of the witnesses who were permitted to prove the execution of the will.

The plaintiffs in error insist that the court first erred in deciding that they (the subscribing witnesses) were incompetent to testify at the time of trial. This decision of the court was in their favor, and made at their instance, and the exception was taken by the adverse party. They refused to testify, because they were parties to the record, and their interest was against the establishment of the will. That they might have testified, if they were willing, was decided by this court in Dickey vs. Malachi (6 Mo. R. 171.) If any error was committed by the court in allowing the exemption which they claimed, it is not one of which they can complain. The general rule is undoubtedly, that parties to a suit cannot be compelled to testify; it is not material now to determine whether the present case is an exception.

Our statute requires a will to be attested by two or more competent witnesses, but if the witnesses are competent, at the time of the execution of the will, a subsequent incompetency will not affect the validity or formality of its execution. If this was so, the purposes of a testator might be defeated by events which no precaution on his part could anticipate or prevent. Hence it is held, that where a witness to a will is competent, when he attests, a subsequent commission of a crime or succession to an estate under the devise, will not invalidate the execution, but in such cases the hand writing of the witnesses may be proved.

Our statute has provided for several cases of this kind. Thus, where the witnesses, or either of them, are dead, insane, or their residences unknown, secondary evidence is expressly authorized. These instances are not, I apprehend, to be construed upon the maxim of *expressio unius exclusis alterius*, but are merely a codification of what was already the common law, and a recognition of the principle upon which secondary evidence may be admitted. This principle will apply as well to other cases of incompetency arising subsequent to the execution of the will as to the cases put.

The witnesses to the will were clearly competent at the time of subscribing. They were heirs at law, and not legatees or devisees under the will. Their interest was against the establishment of the will, and under such circumstances this court has recognised their competency

THOMPSON to use of HAYDEN vs. BLACK. JEFFRIES vs. BLACK. Ex'r., &c.

in several cases. They relied upon their exemption as parties to the record, and relying upon the privileges incident to such a position, refused to testify. If such a refusal should have the effect now claimed, and prevent the introduction of other testimony to establish the will, the intentions of the testator must be very often liable to be defeated, and a will valid at the date of its execution, be rendered inoperative by subsequent circumstances not likely to be foreseen.

Judgment affirmed.

JARED THOMPSON TO USE OF LUKE F. HAYDEN vs. STEPHEN BLACK.

ERROR TO CLARK CIRCUIT COURT.

ELLISON for plaintiff.

For the reversal of this judgment the plaintiff relies upon the 13th section in the 8th article, Justices' Courts, page 670 of the stat. of 1845, as well as upon common sense and justice.

Judge BIRCH delivered the opinion of the court.

There being, in this case, no such bill of exception as will enable this court to pass upon the errors assigned, the suit is dismissed.

JEFFRIES vs. McLEAN, Ex'r., &c.

1. Where a plaintiff in a suit takes a non-suit, and institutes a new suit by filing the same original declaration, although this is improper practice, it is not sufficient cause for reversing a judgment.

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2. A bond executed to A, *guardian of B*, is evidence of a debt due to A, and may be sued upon by the legal representative of A.

APPEAL FROM FRANKLIN CIRCUIT COURT.

STEVENSON & JONES for appellant.

A suit can only be commenced in a court of record in this State by filing in the office of the clerk of the court a declaration setting forth the plaintiff's cause of action. Rev. Stat. chap. 136, art. 1st, sect. 1.

Papers in a cause, after being filed, are beyond the control of counsel or parties, and that the possession of them again, in order to alter, amend or re-file, can alone be had by leave of the court.

The demurrer filed in this case was good, and should have been sustained by the court below, and not overruled.

Where several are bound or liable, accord and satisfaction from one is a satisfaction to all. Tuck. Com. Vol. 2, page 25.

The delivery and acceptance of a note on a third party, by a debtor to a creditor in lieu of a note of the debtor's, is a good bar to recovery upon the note of the debtor. Greenleaf on Ev. vol. 2, p. 24; 14 Wendle, 116; Kellogg & Dumont vs. Richards & Sherman; Letcher vs. Bank, 1st Danna Kent. Rep. 84.

Where an agreement is made between creditor and debtor, and afterwards the original agreement between the parties executed, the creditor cannot by stipulations, made without the consent of the debtor, avoid the effect of the execution of the original agreement to the prejudice of the debtor.

Where a note on a third party is received by a creditor, in satisfaction of a note on a debtor, the creditor has no right to surrender the obligation of the third party and resort to the original obligation, without the assent of the debtor.

The circuit court should not have given the instructions asked for by the plaintiff, because the law, as laid down in said instructions, is not supported by the evidence, and they are calculated to mislead the jury.

The finding of the jury is contrary to the law and evidence of the case, and that the circuit court should have granted a new trial as asked for by the defendants.

The instructions of the plaintiff and defendants conflict, and are calculated to confound the jury as to the law of the case.

FRIZZELL for appellee, insists:

That the court below committed no error of which Jeffries can complain.

Judge RYLAND delivered the opinion of the court.

This was an action of debt brought by the plaintiff, Elijah McLean, as executor of Ambrose Ranson, dec'd., to the use of John G. Chiles, in the circuit court of Franklin county, against John L. Hamilton, Thomas Buckner and Cuthbert S. Jeffries. The summons was returnable to the March term, 1848, of the said circuit court. It was properly

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served on the defendants Buckner and Jeffries, and at the return term of the writ, it appears from the record, that the defendants appeared and made their motion to dismiss the suit, which was overruled; they then filed their demurrer to the plaintiff's declaration, which was also overruled; and that they afterwards filed the statutory plea to the plaintiff's declaration. A trial was had before a jury, and a verdict and judgment for plaintiff. Motions were made by defendants, first for a new trial, which was overruled, and afterwards in arrest of judgment, which was also overruled; and the defendants bring the case to this court by appeal.

I will first notice the objection taken to the action of the court in overruling the defendants motion to dismiss the suit. It appears from the record that there was a non-suit once in this case, and that the plaintiff commenced this present action by filing the old declaration anew without first having leave of the court to withdraw it, or to make any amendment thereto.

We think the court below can sufficiently take care of its own records and papers; and although we hesitate not to reprobate such carelessness and such negligence on the part of lawyers, who thus act, yet we are not inclined to reverse the judgment of the court in its action in this particular.

The defendants cannot complain of the action of the court in overruling their demurrer to plaintiff's declaration. If the defendants really supposed that the declaration of the plaintiff was not good and sufficient in law to maintain his action, they should have suffered judgment to have been given against them on the demurrer; and they might then in this court insist upon the insufficiency of the declaration.

The bond sued upon in this case is as follows: "For value received we or either of us promise to pay A. Ranson, guardian of J. G. Roberts, the just sum of three hundred and forty-nine dollars and fifty cents, without defalcation or discount, together with ten per cent. interest per annum thereon, from this date until paid. Given under our hands and seals at Union, this 29th day of March, 1839.

JOHN L. HAMILTON, [SEAL.]

THOS. BUCKNER, [SEAL.]

C. S. JEFFRIES, [SEAL.]

The plaintiff, in order to support his action, offered this bond in evidence, and also letters testamentary granted to him upon the estate of A. Ranson, deceased, upon the probate of the last will and testament of said A. Ranson. The defendants objected to the giving the bond and

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letters testamentary in evidence ; but the objections are general, and do not deserve the passing notice of this court.

The defendants then gave in evidence the record of the appointment of John G. Chiles as guardian of F. G. Roberts, and an order of the county court upon A. Ranson, the former guardian, to pay over to Chiles, the present guardian, the money in his hands. And also introduced the plaintiff, Elijah McLean, in this action as a witness to testify that he had no interest in the bond here sued upon, as executor of Ranson, or otherwise ; that he never saw the bond before, and that it was not found among the papers of Ranson. Defendants also introduced Stephen W. Wood and Jackson Farrar as witnesses, whose testimony had a tendency to prove some attempt to arrange and settle the debt of Hamilton here sued on, by and between Jackson Farrar and Dr. Chiles, but from the evidence of said Farrar, the jury might well believe that no definite arrangement was ever made between them, and that the bond was never paid. The court gave all the instructions asked for by the plaintiff, and also by the defendants. The defendants fourth instruction is as follows : "That the jury are to judge from all the circumstances of the case whether the note of Farrar, with satisfactory security, was given and received as satisfaction of the note here sued on, and if they find that said note was thus received by Chiles as such satisfaction, then the giving up said note to Farrar, without Jeffries' consent, discharged Jeffries, and they must find for the defendant's."

The defendants have no cause to complain of the action of the court ; for all the evidence offered on their part might have well been excluded. The bond here sued on, is evidence of a debt due by the obligors Hamilton, Buckner and Jeffries, to A. Ranson ; and his executor can maintain the action thereon ; and all the evidence about Dr. Chiles, and the negro man Abram, and the land of Breckenridge, has nothing to do with the case, and ought in justice to the plaintiff to have been excluded. The words "A. Ranson, guardian of F. G. Roberts," are but descriptive of the person, mere *descriptio personae*.

From this view of the case then, there was not the slightest ground for the court below to interfere with the verdict of the jury. The declaration is sufficient, at all events after verdict, to support the judgment. And as the defendants have had the benefit of all their proof, both against the plaintiff McLean, and also against the person to whose use the action was originally commenced, Dr. Chiles ; and the jury after hearing all the facts, have found against them, in my estimation the purposes of justice will be best subserved by suffering the judgment below to remain untouched. Let it, therefore, be affirmed.

BOULWARE vs. THE BANK.

BOULWARE vs. THE BANK.

Where the cashier of a bank, through mistake, cancels a note executed to the bank, it does not affect the right of the bank to recover the debt.

ERROR TO RALLS CIRCUIT COURT.

WELLS & DRYDEN, for plaintiff.

1st. The note of 180 dollars, being a negotiable security, is shown to have been in blank when it was endorsed and delivered to the bank; and the bank having no notice from either the makers or endorser that it was for the accommodation of the makers, or that the proceeds were to be applied to any particular object, had the right to treat and regard the notes as the property of Levy N. the endorser, and to place the proceeds of the discount to the credit of the said Levy N., and hold the makers responsible for the obligation of the note.

Bank of Saline vs. Babcock, 21 Wend. Rep. 499.

2d. The cancellation of a note while in the hands of the payee or endorser, raises the presumption of payment or satisfaction which must be rebutted by the plaintiff.

3d. The assent of Richard Boulware, and all others to the application by the bank of the proceeds of the note of 180 dollars, and the twenty-six dollars to the payment of the note now in suit, is to be presumed as against the bank, until their dissent is shown. The bank by making the application has committed herself, that she was authorized so to do. She at least thereby affirmed she had no directions to make any other appropriation of the same. She should not be allowed to blow both *hot* and *cold* with the same breath.

4th. The law will not presume an accommodation endorsement—it is a fact that must be proved by him who avers it. The presumption is, the payors are the debtors of the payee, as the note by its terms would indicate. The bank has not only not proved in this case that Levy N. endorsed the note of 180 dollars for the accommodation of the makers, but she is by her acts at the time of the discount of the same, and by her adherence to those acts for a period of some four years, and by the continued acquiescence in those acts of the bank, by both the makers and endorser, precluding from affirming that it was an accommodation endorsement. Or that she had notice to make any other appropriation of the funds.

5th. The first instruction given for the plaintiff below, is faulty in this, that it assumes the proposition that if the note of 180 dollars was the property of Richard Boulware, and that he placed the same in bank for the purpose of renewing a note on which he was a party, the application of said note to any other purpose by the bank, was inoperative and void, without regard to the question whether the bank had or had not notice of the property of the said Richard, and of the use to which he wished it applied. 21st Wend. Rep. 499. It is also faulty in limiting the jury in their finding to the evidence of payment by means of the 180 dollar note, and the 26 dollars placed in bank—whereas, the bare cancellation raises the presumption of payment.

6th. The second instruction of the plaintiff below is likewise faulty in this, that it contains an abstract proposition of law, without reference to the evidence before the jury—and calculated only to mislead. Donahoe vs. Glasgow &c.; 1st Mo. Rep. 259; Williams vs. Harrison 3 Mo. Rep. 411; Nicholas vs. the State 6th Mo. Rep. 6.

7th. The third instruction given for the plaintiff is wrong in this, that it was not warranted by the evidence in the cause. It is manifest that the cashier knew what note he was cancelling. If the funds were misappropriated, it was not the fault or mistake of the officers of the bank, but because of the omission of Richard Boulware to direct their application, of which he does not complain. There is no evidence that he has not paid, or is ready and willing to pay said note.

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8th. The law of the case is correctly presented in the fourth instruction asked by the defendants but refused by the court.

9th. A replecation should either deny, or confess and avoid the matter of the plea. The defendant's fifth plea alleges property in Levy N. in the note of 180 dollars, and the payment of 30 dollars—the plaintiff's replication neither denies nor confesses and avoids the property of Levy N., nor payment of the 30 dollars by Levy N., but alleges that Richard *delivered* the note of 180 dollars to the bank's cashier, with the intent and design that the same should be applied to the renewal of the note of 218 dollars (an intention he had not the right to execute unless he had property in the note of 180 dollars) and that South, the cashier, contrary to Richard's design, and by mistake applied said note and 26 dollars and 75 cents *deposited* in said bank by Richard to the renewal of the note now in suit. Said replecation is irresponsible, and tenders an immaterial issue.

10th. The defendants 2d, 3d, and 4th pleas, present good and substantial defences to the plaintiff's action, and the court erred in sustaining the demurrer thereto.

Judge RYLAND delivered the opinion of the court.

This was an action of assumpsit brought by the bank of the State of Missouri against John N. Boulware, and Levy N. Boulware, counting as follows :

1st. On a note of \$200 at four months, dated July 30th 1842, negotiable and payable at Bank at Palmyra.

2d. For \$300, so much money lent, paid out and expended for defendant's use.

The defendants appeared to the action, and filed six pleas as follows:

1st. Non-assumpsit.

2d. In bar to the first count of the plaintiff's declaration—that the note named therein fell due February 25th, 1843, and that the plaintiff received in full satisfaction of the same \$30 in money, and a note for \$180 on William H. Boulware and Richard Boulware.

3d. In bar of said first count, further, that after the said note fell due, William H. Boulware and Richard Boulware made a note for \$180 to Levy N. Boulware, who endorsed the same to the plaintiff, and also paid at same time \$30 in money in full satisfaction of the said note.

4th. In bar of first count, that said note had been cancelled and destroyed by plaintiff without the consent of the defendants.

5th. In bar of the first count substantially as the second and third pleas mentioned above.

6th. In bar of the said first count, the payment of the sum of two hundred and twenty dollars in full.

The plaintiff filed demurrer to the 2d, 3d, and 4th pleas, which the court sustained, and took issues on the 1st and 6th pleas, and filed by leave of the court two replications to the said 5th plea, as follows:

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1st. Replication : That the note and money mentioned in said 5th plea as given in satisfaction of the note sued on, was not in fact given to the plaintiff in satisfaction of said note sued on.

2d. Replication : That the said note mentioned in said 5th plea was no satisfaction, because there was no consideration for the giving thereof. These replications the defendants traversed—the cause was then tried on these issues, and the jury found the issues for the plaintiff. The court refused to grant a new trial, and refused to arrest the judgment—and the defendants bring the case before this court by writ of error.

The defence in this case might have well been made under the plea of non-assumpsit ; and the defendants should not have been permitted to encumber the record by their long array of pleas. However, the circuit court permitted them to take that course ; for their 5th plea contains nothing more than what had been offered in the 2d and 3d pleas. The demurrer was properly sustained to the 2d, 3d and 4th pleas, and the defendants were permitted to have the facts which they supposed exonerated them from the payment of a just debt tried by a jury.

The evidence, as presented by the bill of exceptions, shews that the note sued on in this case was cancelled by the cashier of the bank by mistake ; that it was never paid to the bank, and that the money mentioned therein is still due the bank.

The evidence fully and most satisfactorily accounts for the cancellation of the note, and places it beyond the power of the defendants to take advantage of that act of the cashier.

The court committed no error in giving the instructions as prayed by the plaintiff, and in refusing the one which it was asked to give for the defendants.

Let the judgment be affirmed.

McDANIEL vs. PRIEST.

Where the certificate of acknowledgment of the clerk of the circuit court, upon a deed executed by husband and wife to convey lands of the wife, states that the wife upon "sepa-

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rate examination, acknowledged and declared that she executed the deed and relinquishes her *dower* in the lands mentioned in the deed," the deed will not pass a fee simple interest of the wife.

ERROR TO RALLS CIRCUIT COURT.

GLOVER & CAMPBELL, AND DRYDEN for plaintiff.

1. The deed and certificate of acknowledgment were insufficient in law to pass the wife's est. : it would possibly have been good to pass dower, but she had no dower in the lands, and could therefore pass nothing. Revised Code, 1825, vol. 1, page 220, section 12. This act requires that the contents of the deed shall be explained to the wife. This, as we conceive, does not suppose that the wife may not be able to read ; but that she is ignorant of matters of law, and does not understand the operation of the act she is about to do. The privy examination and explanation then should show her what are her rights, and she must freely assent, knowing them, to give them up. Here the plaintiff was misled and deceived ; she thought it was dower she was passing away, when an estate in fee simple has been taken from her, if the deed shall be made a bar to her claim. She is told the execution of the deed will relinquish her dower, and she executes it.

Had she not been told the deed would only pass a right of dower, she might not. The argument which seeks to separate the examination of the court, and confine it only to the question whether she "executed the deed," striking out the words, "and relinquishes her dower," does violence to the true character of the transaction, and gives it an effect never understood by the examiners or the wife. In every part of the certificate the relinquishment of dower is presented as the ultimatum of the effect of the transaction. See U. S. Digest, vol. 2, p. 129, No. 252, 253, 254; 7 Monroe, p, 661. The object of the privy examination is to ascertain if the wife "freely executed the deed," and "understood the nature and consequences of her act." The acknowledgment must not only be free, but intelligent. 3 Damas R, 113, 114, 115, 117.

The court erred in not setting aside the non-suit in plaintiff's motion.

Judge NAPTON delivered the opinion of the court.

The only question in this case is as to the sufficiency of a certificate of acknowledgment by the clerk of the circuit court of Marion county made in 1834, to the execution of a deed, by George McDaniel and his wife, conveying certain lands belonging to the wife. After the death of McDaniel, his wife brought ejectment to recover the land, and her right to a recovery depended upon the validity of this certificate, which was as follows : "Be it remembered, that on this, 17th day of February, 1834, it being the first day of the February term of said court, appeared in open court, George McDaniel and Charlotte, his wife, both of whom are well known to the court to be the persons whose names are subscribed to the within deed, as having executed the same and severally acknowledged the same to be their act and deed for the purposes therein mentioned, the said Charlotte, being first made acquainted with the

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contents thereof, and by the court examined separate and apart from her husband, whether she executed the said deed and relinquishes her dower to the lands and tenements therein mentioned, voluntarily, freely, and without compulsion, or the undue influence of her husband, acknowledged and declared that she executed the said deed, and relinquishes the dower in the lands and tenements therein mentioned, voluntarily, freely, and without compulsion, or the undue influence of her said husband, and does not wish to retract it. In testimony whereof, &c."

We have never been disposed to exact a literal conformity to the statute in the certificates required by law to the acknowledgment of deeds. The current of decisions, both in this court and in other courts, is decidedly against any nice or technical construction of the language employed by the various officers to whom this authority is by law entrusted.

A rigid interpretation of the statutes prescribing the forms in such cases, would tend to gross injustice, and tend to overthrow many titles honestly acquired. All that is considered requisite is, that the law be substantially complied with. The certificate must show that the contents or character of the deed was explained to the wife by the officer authorised to take acknowledgment; that she was subjected to a privy examination, and that she, upon this privy examination, acknowledged its execution to have been a voluntary act, and without any undue influence of her husband. The acknowledgment certified to in this case, contains every thing required by the statute, but is accompanied with a relinquishment of dower. It states that the wife was not only examined as to whether she executed the deed, but whether she relinquished her dower in the land, and that she acknowledged that she did execute the deed freely, &c., and did relinquish her dower in the land therein described, &c. If the relinquishment of dower were stricken out of this acknowledgment, it would be in exact conformity to the provisions of the act which directs the mode of passing the wife's estate. Can we regard this portion of the certificate as surplusage? If we can, it should not vitiate the certificate.

If the superfluous words used in the certificate had no tendency either to limit or extend, or control in any manner the language immediately preceding it, there would be no objection to regarding it as mere surplusage. But it is obvious that the additional clause might well be construed as a limitation upon the effect of the preceding acts, and that the wife had in executing the deed merely relinquished her dower, and had not parted with her estate of inheritance. This will be rendered more ob-

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vious by comparing the certificate with the one required by law in a case of mere relinquishment of dower, and it will be seen that the clerk followed literally the form of a relinquishment of dower. To hold this acknowledgment then to be sufficient to pass a fee simple title of the wife, will be, in effect, to hold that a relinquishment of dower as required, and in the form required by statute, will answer either to pass dower, if the wife has no more interest, or to pass her fee simple when she is the owner of the estate designed to be conveyed. This would be giving a latitude of construction not warranted by the statute, and dangerous to the rights intended to be protected.

The fair inference from the certificate in this case is, that the wife supposed or was advised that she had but a right of dower in the land, and that the deed she had executed was intended to deprive her of that interest alone. We cannot assume that the wife was aware of the extent of her interest. Deeds are frequently drawn up in the same terms where the estate of the wife is conveyed, or where the wife is but relinquishing her right of dower. To permit precisely the same form of certificate to cover both cases, would not only be a departure from the words of the statute, but might open the door to gross fraud upon married women.

Judgment reversed and cause remanded.

JEREMIAH TAYLOR Jr. vs. VINCENT FORMAN.

Upon a trial of the right of property before a jury, summoned by a sheriff, the claimant recovered less than half (in value) of the property claimed by him: the sheriff taxed all the costs against him.

Held.—That the taxation of the costs by the sheriff was right.

ERROR TO MARION CIRCUIT COURT.**ANDERSON & DRYDEN for plaintiff.**

1st. That the claimant in a proceeding like this, must make good his *whole* claim before he can recover costs from the plaintiff in the execution.

By the provisions of the 21st section already cited, any person other than a defendant in the

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execution may claim the property levied upon or any part thereof. It is the business of such claimant to determine at his peril before he makes his claim, what his rights are. He may claim the whole of the property levied on, if it be his. If not, he may claim so much as he has a right to. If he sustain his claim, the 23d section of the same act provides that the plaintiff in the execution shall pay the cost of the inquest. If he does not sustain it, he shall himself pay the costs. It is not upon his recovering a part of what he claims that he is entitled to costs against the plaintiff, but upon his making good his claim. In this case, the claimant claimed the whole of the property levied on, of the value of 92 dollars, but recovered only 32 dollars thereof. The plaintiff in the execution recovering the residue thereof, 60 dollars.

2d. If the defendant in error is not liable for all the costs, by reason that he recovered a verdict for a part of the property claimed, still, under the 23d section before referred to, he cannot recover costs of the plaintiff, because the verdict was as well for the plaintiff as for defendant—more for the plaintiff than the defendant.

The most favorable views that can be taken of this statute for the defendant is, that the case now under consideration is not provided for by the legislature, and that the parties respectively are left each to pay his own costs, as at common law.

GLOVER & CAMPBELL, for defendant.

1st. The defendant in error recovered a portion of the property, and as general principles was entitled to costs.

2d. This remedy was given in lieu of the common law actions of trover, detinue, or replevin ; and if a verdict for part would have entitled him to costs, he is by analogy entitled here.

3d. The court had no power to divide the costs, since the statute is silent, and the common law would give costs to the plaintiff.

4th. To have given the costs against the plaintiff, as was done by the sheriff, would have been without the sanction of any admitted rule of law or sound analogy. Rev. code 1845 p. 480 sec. 23.

Judge BIRCH delivered the opinion of the court.

A fieri facias in favor of the plaintiff having been levied upon a horse worth about sixty dollars, a bureau worth about twenty-five, and a bed worth about seven dollars, the whole was claimed by the defendant in error, and on a final trial of the right of property by a sheriff's jury, the horse was found to be subject to the execution, and the balance exempt. The sheriff having adjudged the costs against the claimant, the court, on the motion, so retaxed them as to devolve the payment of all (except the small portion incurred by a continuance at the instance of the claimant) upon the plaintiff in execution, who, having excepted, is also plaintiff here.

Passing by the question not raised by the record, whether, in cases like the present, the sheriff has any authority at all, or, if he have, whether it was not intended by the statute that his judgment as to costs, like the verdict of the jury as to the property itself, should be final

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and *conclusive*, we are not disposed to interfere with a discretion which the record contains no evidence to impugn, but rather to support.

The statute is somewhat ambiguous, but taking the 21st and 23d sections of the act together, and acting upon the statute alone, we would have adjudged the costs in this case as the sheriff did, even without any of the special circumstances with which the officer who witnesses the trial of a cause is presumed to be most familiar, and which, therefore, may very properly enter into his decision.

The claimant not having recovered even the major portion of the property concerning which he demanded a trial, and which resulted in a heavy bill of costs, we are unable to perceive upon what principle of justice he would be entitled to inflict costs upon another for prosecuting that heavier portion of his claim adjudged to be unfounded; and the sheriff having no authority to divide the costs, as at common law, and there being no motion to that effect in the court below, we feel that we cannot do better than to treat it as a case in which that officer was as well or better qualified to approximate the point of justice between the parties than either the circuit court or this court. There being, therefore, no question made as to the transgression of this authority, and no abuse of it being apparent from the record, the judgment of the circuit court is reversed.

JOSEPH YOUSE vs. FREDERICK NORCOMS.

A deed of bargain and sale executed by husband and wife on the 4th November, 1816, purporting to convey the wife's real estate, the wife being at that date an infant, may be avoided by their deed executed to another person on the 5th February, 1846.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

This was an action of ejectment for a lot of ground in the city of St. Louis, fronting on the river, brought in the common pleas, on the day of August, 1848. A judgment was rendered for Norcum, plaintiff below, in December last, from which Youse took an appeal.

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The recovery was for a lot of 18 feet 8 $\frac{1}{2}$ inches in front, running back some 137 feet 11 inches. This lot was part of a square or block of ground lying between Cherry street on the north, and Oak street on the south, Main street on the west, and Front street on the east, separating it from the river. The plaintiff below, as well as defendant, claimed under one Nicholas Hebert dit Lecompte. No documentary evidence of title in said Nicholas Lecompte, was given by plaintiff below, but he proved by oral testimony that said Lecompte lived on that square as far back as 1787, and continued to reside there till his death on the 27th April, 1815. That block was under the Spanish government, the last block in the town towards the north reaching up to near the half moon fortification. It appeared that Lecompte had his ground entirely enclosed by fences, the front fence running along on Main street, the south along the cross street towards the river, since called Oak street, and the fence on the river side was some distance back from the river, supposed to be about 40 yards distant from low water, by the witness Pascal L. Cerre. The same witness testified that Lecompte did not occupy the whole block or square in front on Main street, but that one Chs. Buisson, son in law of Lecompte, occupied the northern part of the square next to what is now Cherry street, and lived on it, having his lot enclosed, and there being between his fence and the northern fence of Lecompte, a passage left which ran the whole depth of Buisson's fence. He further stated that Lecompte's house was near his (Lecompte's) northern fence, and that Lecompte's front on Main street extended from Oak street on the south, more than half the square, but did not comprehend the whole square, and did not embrace Buisson's lot; that he could not tell the size of Buisson's lot, whether more or less than 50 feet; that Buisson lived there about the time of the change of government, but whether before or not he could not say. The plaintiff below gave in evidence a deed from said Lecompte to Julie Bissonet, his daughter, dated 2d July, 1812, conveying to her the southern portion of said block, to wit: 45 feet French measure on Main street, running to the river, bounded south by cross street, (afterwards Oak) also a second deed from Lecompte Julie Bissonet, dated 27th July, 1814, conveying to her 25 feet, French measure, bounded south by the other lot conveyed to her, and north by land reserved by the grantor, thus giving to that daughter 70 feet, French, off from the south side of the block. The plaintiff read in evidence also a deed from Joseph Bissonet and Julie, his wife, dated 6th September, 1815, to McKnight & Brady, conveying to them the lot last above mentioned of 25 feet in width, bounded north by the property of Nicholas Lecompte, deceased; also a deed dated the 9th September, 1815, purporting to have been executed by the heirs of said Nicolas Lecompte, to wit: Nicolas Hebert Lecompte, Guillaum Hebert Lecompte, Hyacinth Hebert Lecompte, Charles Buisson, Joseph Bissonet and Julie, his wife, Marie Hebert dit Lecompte, and Pierre Choteau, jr., acting for Peter Hebert dit Lecompte. This deed, after reciting that they are the heirs of Nicolas Lecompte, sets forth that they are desirous of regulating and disposing of the property and effects of his estate, with the intervention of a court of justice, and provides that Charles Buisson shall make an inventory of the moveables, and a sale and division of the proceeds, said moveables comprehending certain slaves; that Nicolas Hebert Lecompte and Guillaum Hebert Lecompte, transfer and convey to the estate 200 arpens of land, situate at the point of the Missouri, which had been sold to them by the said Nicolas Hebert dit Lecompte, by deed dated 17th March, 1815, "reserving to themselves only the town lot mentioned in said deed, which contains 85 feet front on Main street, by 150 feet more or less in depth, bounded west by Main street, east by Mississippi river, north by the lot of Charles Buisson, and south by the lot of Marie Hebert dit Lecompte; the deed then proceeds as follows: Fourthly, that by these presents, for the considerations known and recognised between the undersigned heirs, they, the said undersigned heirs, sell, assign, transfer, quit claim and convey to the said Marie Hebert dit Lecompte, a town lot situate in this city of St. Louis, containing thirty-five feet in front, and 150 feet more or less in depth, bounded in front on the first principal street that separates it from the lot of Jacques Lajeunisse, east by the river Mississippi, north by the lot of Nicolas & Guillaum Hebert dit Lecompte, and south by the lot of McKnight & Brady, heretofore of Joseph Bissonet, for her, her heirs and assigns,

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to enjoy and dispose of," &c. Said deed then states that the reserve by Nicolas & Guillaum above stated, is ratified; and that Buisson is authorised to sell a tract of 400 arpens of land lying in the point of the Missouri, and to divide the proceeds thereof, and of the personality equally among said heirs. This deed was acknowledged by the parties, and recorded on the 28th September, 1815. The lot sued for in this action is part of the one described as conveyed to Marie Hebert Lecompte. She was born on the 2d May, 1798, and was married the 4th September, 1816, to Joseph Vasquez. On the 4th November, 1816, Joseph Vasquez and Marie, his wife, conveyed the said lot of 35 feet, in fee, to Thomas Hanley. Hanley and wife mortgaged the same, in fee, to John Mullanphy; on the 27th March, 1818, that mortgage was foreclosed, and a sale made of the lot to John Mullanphy, and a sheriff's deed executed therefor to him, dated 6th November, 1824, which several deeds were duly recorded at or near their respective dates. It was proved that Mullanphy took possession of said lot in 1824 or 1825, and he and his representatives have held continued possession thereof ever since; and that in 1826 or 1827, he built ware houses on the front of it, and that the defendant is tenant of the heirs of said John Mullanphy. Marie Hebert was a little over 18 $\frac{1}{4}$ years of age at the time she and her husband, Vasquez, made the deed to Hanley. She and her husband lived in and near St. Louis always, till his death in June, 1848; at the time of his marriage he lived with his mother, about 300 feet from the lot in question, and continued to reside at the same place for many years, and then removed to Viede Posche, and never lived out of the county of St. Louis.

On the 5th February, 1846, Joseph Vasquez and wife made their deed to Louis A. La-beaume of that date, conveying their right, title and interest in said lot, without any covenants for the title, and by deed dated 29th May, 1846, La-beaume and wife convey to the plaintiff's below the same lot.

Nicolas Hebert Lecompte, the elder, left at his death children and heirs, to wit :

NICOLAS HEBERT DIT LECOMPTE,
PIERRE HEBERT DIT LECOMPTE,
GUILLAUM HEBERT DIT LECOMPTE,
HYACINTH HEBERT DIT LECOMPTE,
JULIE BISSONET,

MARIE LOUISE, afterwards married to Vasquez.

All these are dead except this Vasquez; and none left children except Peter, Hyacinth and Julie.

A deed was read in evidence by defendant below, dated 4th September, 1815, from Pierre Hebert dit Lecompte to Charles Buisson, which set forth that his father, Nicholas Hebert Lecompte, and his mother in their life time had often told him that they had given to Buisson a lot of 50 feet French measure, part on Main street, bounded north by cross street or Madame Laquaisse, south by lot of said Nicholas, and east by the bank of the river; and that he knew that Buisson had advanced them money or other effects to more than the value of the lot; that therefore he the said Pierre quit claimed and conveyed said lot to Buisson in fee. This deed was acknowledged on the 4th Sept. 1815. Below it, on the same sheet, is the deed of Nicholas, Guillaum, Hyacinth, Bissonet and wife Julie, and Marie Hebert Lecompte, dated the 9th of September, 1815.

The defendant also gave in evidence the deed of Joseph Vasquez and wife Marie, to Robert N. Moore, dated the 10th April 1845, conveying to Moore her interest in Buisson's 50 feet lot. This deed recorded in October 1848.

The defendant asked the following instructions :

1st. If the court, setting as a jury, find from the evidence that the title of the land in controversy in this action, was conveyed in fee to Marie Louise Lecompte, in the year 1815, and that afterwards, in September of that year, she was married to Joseph Vasquez; that on the 4th November, 1816, the said Vasquez and wife executed and delivered to Hanley the deed given in evidence in this case of that date, and that that deed described and purported to convey the same

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land; that the said Marie Louise was born on the 2d of May, in the year 1798, and that neither she or her husband, at any time within four years after she married, at the age of twenty-one years, rescinded, or attempted to rescind their said conveyance to Hanley, nor within that time brought any suit for, or set up any claim to said land inconsistent with their said deed, then they will find for the defendant.

2d. If the court, setting as a jury, find from the evidence that Joseph Vasquez and wife executed to Hanley the deed given in evidence of 4th September, 1816; that it embraces the land in controversy, and was duly acknowledged and recorded in a year from its date; that the same land has been ever since claimed and held under that deed by Hanley, and those claiming under him; that said Vasquez and wife have lived in St. Louis county ever since, till June 1848, when said Vasquez died; that said land was occupied by buildings and improvements made by Mullanphy, claiming under Hanley in 1824 or 1825, and from that time ever since openly and notoriously; that Vasquez and wife have ever since said deed to Hanley, known of Hanley's claim, and of those claiming under him, and of their possession, and have never, till 1846, by any act, disaffirmed said deed to Hanley, or notified the owners or occupants of said land that they, or either of them, set up any claim to it—such acquiescence is a ratification of their deed to Hanley, and said deed is not rescinded by their deed to Labeame.

3d. That if the deed of Vasquez and wife to Hanley, given in evidence in this case, was executed while the said wife Marie Louise was under the age of 21 years, on the 4th September, 1816, but was at least of the age of eighteen years and upwards, then said deed was operative to pass the title to the land embraced in it, and that such title could be defeated only by an entry upon the land for that purpose, after her arrival at the age of 21 years.

4th. That the deed given in evidence by the plaintiff, from Vasquez and wife to Labeame, is not operative to rescind the conveyance, and divest the title made by them by their deed to Hanley; if the jury find each of those deeds to have been made respectively at their dates, and that the said wife was a minor between 18 and 19 years of age at the date of the conveyance to Hanley.

5th. That coverture is a disability which renders it impossible while it exists for the wife to rescind a conveyance made while she was a minor.

6th. The defendant moves the court to decide that if the deed dated the 9th day of September in the year 1815, under which the plaintiff claims, conveying the property in question to Marie Louise Lecompte, and the deed of the same date executed by her and others, heirs of Nicholas Lecompte deceased, to Charles Buisson, conveying a lot to him which had belonged to the said ancestor Nicholas Lecompte, formed parts of a family arrangement then made in relation to the division of the estate in which they were interested as heirs of said Nicholas, and were mutual considerations each for the execution of the other, and if before any conveyance by the said Marie Louise, and her husband, Joseph Vasquez, to Louis A. Labeame, she and her said husband had disaffirmed the conveyance made to said Buisson as aforesaid, such act of disaffirmance operated to annul the other conveyance made to her as a part of the same family arrangement, and division of the said property of her deceased father, Nicholas Lecompte.

7th. If the jury believe from the evidence that more than twenty-four years elapsed between the time that Maria Louise Lecompte, wife of Joseph Vasquez, arrived at the age of twenty-one years, and the date of the deed from said Vasquez and wife to Louis A. Labeame, read in evidence on the part of the plaintiff, then they ought to find for the defendant.

All which said instructions were refused, to which refusal, to give them and each of them, the defendant by his counsel excepted. The court then, of its own motion, gave the following instruction:

It being admitted by the parties that both claim title under Marie Louise Lecompte, the court decides, that if the court, setting as a jury, find from the evidence that Marie Louise Lecompte was born on the 2d of May 1798; that the lot in controversy was conveyed in fee to said Mary Louise in the year 1815, that afterwards, in that year, she was married to Joseph Vasquez, and that on the 4th of November, 1816, the said Vasquez and wife executed and delivered to Thomas Hanley the

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deed given in evidence, under which the defendant claims, such deed was a voidable conveyance by reason of the infancy of said Marie Louise, at the date of its execution and delivery. And if the court find also from the evidence that subsequently, on the 5th day of February, 1846, the said Joseph Vasquez and wife executed and delivered the deed to Labaume, which was read in evidence, and that the same was recorded in the recorders office of St. Louis county, on the 6th day of February, 1846, the execution, delivery and record of such deed to Labaume will operate to annul and void the said deed to Hanley; and if the court do further find from the evidence that the deed from said Labaume to the plaintiff was duly executed and delivered, and that said Joseph died in the month of June, 1848, and that the defendant was in possession of part of said premises at the commencement of this action, the verdict ought to be for the plaintiff.

To the giving this instruction the defendant below excepted. A motion for a new trial was made and overruled, and an exception was taken to that decision of the court.

SPALDING & SHEFLEY, for appellant.

1st. The Spanish statutes govern the rights of parties to the conveyance of 4th Nov. 1816, of Joseph Vasquez and wife to Thomas Hanley. 1 Edwards Com. 6 sec. 13 and page 13. Sec. 16, congress expressly declares the existing laws of Louisiana to be in force, which were the body of the Spanish laws. So that after these acts of congress, the mass of *Spanish law*, which was in force here, had the validity of a *statute*.

Those laws were not repealed by the introduction of the common law, by act of the general assembly of the territory of Missouri, passed January 19th, 1816. 1 Edwards Com. 436, which act introduced the common law only, so far as it is not repugnant to, nor inconsistent with the *constitution and laws of the U. States*, "and not contrary to the laws of this territory."

4 Mis. Rep. 380 Landell vs. McNair. That the Spanish law was in force on 22d March 1820, and not the common law as to the effect of a conveyance of land. The case in 7 Mis. Rep. 339 Mass vs. Anderson, does not militate against it. The court there say that since the introduction of common law and statute of frauds, a deed is necessary to convey land. This was certainly not necessary by the *common law* alone, for by *common law* a *deed* was not necessary to convey land Cruise digest, title XXXII Ch. 1 sec. 20, 21, 22.

At any rate, where the common law was silent, and made no provision, positive, *Spanish law* was not repealed.

There was no statute here, or subject of disability of infants, and rescinding and affirming their contracts, and the common law contained no affirmative provision limiting the period for disaffirming. 1 Mis. Rep. 576, Carter et al. vs. Soulard et al.; Devarris on statutes 703 (7 Law Lib.); also, at pages 707, 708, and 710, 711.

II. The age of majority was made *twenty-one years* by statute, so that Madam Vasquez was of age at 21 instead of 25 years. 1 Edwards Com. page 10 sec. 6—1p. 12 sec. 11 show that *twenty-one* was the age of majority as to all political rights.

1 Edwards page 118 sec. 36; p. 144 sec. 2; p. 417 sec. 67; p. 598 sec. 2; show that the age of 12 was the age of majority for suing, and as to rights of property. 3 Mis. Rep. 40 Dougal vs. Fryer; 5 Mis. Rep. 310, 306 McNair vs. Hunt; 6 Mis. Rep. 169 Collins vs. Clamorgan's adm'r.

Mrs. Vasquez was 21 years old on the 2d May 1819.

III. By the Spanish law, the title passed by the deed made by husband and wife, she being over 14 years of age, and the property being paraphernal; and she was bound to rescind in four years after coming of age, by instituting proper proceedings, or she was bound forever, and this portion of the Spanish law had never been repealed. 2 Moreau's *Partidas* 1152-3; 3 Laws 1 & 2. That *restitution* is the demand made by a minor, to be restored to his former condition, &c.; and that if he is injured he can be relieved, by making proof: otherwise, whatever he, or his guardian had done shall be binding.

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2 Moreau's Part. 1155 Law 6, that he who claims restitution must prove two things: 1st. That he was a minor, or under 25 years old when he made the contract. 2d. And that he made it to his own damage.

2 Moreau's Part. 1157 Law 8, that minor can demand restitution while under age, and within four years after; and whether contract made by himself or by his guardian; and it must be by suit &c.

2 Moreau's Part. 1158 Law 9, as to prescription, or limitation as to minors four years allowed after they come of age.

2 Moreau's Part. 788 Law 4, contract of minor over 14 binding if advantageous to him; that is, it is voidable, not void.

Ibid page 788 Law 5, promise of minor 14 years old, who has no guardian, is valid: but he can apply to judge for restitution, and on showing he was a minor, and is injured, judge can rescind contract.

Ibid page 895 Law 47, same is true of a pledge by minor &c.

2 Febrero p. 137 No. 24, that a bridegroom can give real estate to his betrothed with judicial license; but should he give it without, he must reclaim it in four years after he comes of age, or he is barred.

5 Febrero p. 91 No. 54 privilege of minor under 7 years, and under 14 years, and between 14 and 25 years old. The contracts of this last voidable only.

5 Febrero 101 No. 75. "This benefit (of restitution) is not available to the minor when he approves expressly the contract celebrated in his minority, nor when he does it tacitly, which is, when knowing the injury ("lesion") he suffers the time prescribed by law to elapse, or being of age, does acts inconsistent with the nullity or lesion, or which cannot but infer a ratification for the will deduced from acts, is more authoritative than that which consists in words."

5 Febrero 101. No. 76. That ratification, as aforesaid, may be of act of third person acting in name of the one who ratifies, or of the act of the party himself, and causes two defects, nullity and lesion; and ratification needs none of the solemnities requisite in minors contracts.

3 Mo. Rep. (O. S.) 446. If tutor alienate property of minor, against law, the minor may in 4 years after he comes of age claim it; but his suffering 4 years to elapse, is ratification.

8 Mart. Rep. 630, Fraucain vs. Delarand. A sale made by a minor over 14 years of age, in propria persona, is a good foundation for prescription, and the forms observed in this case were sufficient, if the minor had acted propria persona. Note, there was no oath.

10 Mart. Rep. 732, Cheneau's heirs vs. Sadler. A minor above 14 could contract in his own name, according to Spanish law. (Part 3, Tit. 18, 159.) And if he does not act in 4 years it is ratification, even in case of absolute nullity.

6 Louisiana Rep. 604. Express or tacit approval by minor of sale after they are of age, bears them, whether the conveyance be null for want of solemnities or due forms or not. 6 Louisiana Rep. 601.

2 Vol. Frebreo, 238, No. 37, that the oath makes the contract more binding, but is not necessary to make it valid; and to the same effect is 10 Mart. Rep. 732, where the court say that the form of an oath is prescribed. Part 3 Tit. 18, 1 59, to make the contract more binding.

Partida, 3 Tit. 18, 1 59, prescribes the form of conveyance, saying if minor above 14, under 25 years, the conveyance should be as in other cases, and that in order vendee might be safe and certain, conveyance should state that the minor made oath, &c.

Part 3, Tit. 11, law, 16, shows the effect of the oath, which is to prevent the party from proceeding against what he has sworn, and he could not rescind.

But he could after getting absolution, &c. See note 4 to law 59.

In regard to married women, they were under no disability as to paraphernal property, which was the character of that in controversy in this suit.

As to what is paraphernal property, 3 Frebrero, 133 and 134, Nos. 32 and 33, p. 136, No. 40 and p. 158, No. 19; 2 Febrero 129, No. 8; 1 Moreau's Partidas, p. 523, law 17.

3 Febrero, 134, No. 34, husband with wife's consent can alienate paraphernal property.

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3 Martin Rep. 453, O. S., as to what is paraphernal, and that husband can convey with wife's consent, &c.

4 Mis. Rep. 380, Lindell vs. McNair, as to what is *paraphernal*, and that it could be sold by husband with consent of wife.

4 Febrero, 471, No. 218. That prescription will run as to married women in regard to *paraphernal property*.

This portion of Spanish law was not repealed in 1816, even if the body of the common law was then introduced, for the common law was silent as to any limitation on the right of rescinding a contract by an infant.

The limitation of 4 years applied to the age of majority, and that when that was altered from 25 to 21 years, (which was the case before the introduction of the common law) that 4 years began at that age. It was the same as if the Spaniards had altered the age of majority.

IV. If the Spanish law did not govern; then the *common law* did; and the case is not altered thereby.

1. By that law the title passed. 4 Mis. Rep. 480, Lindell vs. McNair, 17 Wend. 119. See page 131, that all deeds voidable not void. 2 Kent's Com. 234, (3 A. H. Marshall, 935, 938, that title passed at common law,) 5 Ohio, 251; 23 Shepley, 523, 524; 1 Edwards Chy. Rep. 301.

2. Being under disability, she could not rescind. If she could rescind, she could ratify; 30 years acquiescence with knowledge.

3. If she could rescind, she has never done it. 17 Wend. 119; 13 Mass. Rep. 375; 1 New Hamp. 73.

These go to the point, that rescinding can be by entry only. See especially 17 Wend. at pages 132, 133, 134, 135.

In the case of 10 Peters, 58, see page 73, the infant was and had been in possession, which is equivalent to an entry. In 11 John, 539, it was wild land, and entry absurd and impracticable. See page 539, 540, showing it to be wild land. 14 John 124. This case was also for wild land. These three cases are commented on in 17 Wend.

And if the rescinding could be by an act of as high a nature as that which created the estate, or by something similar to such act, has never been performed, *inasmuch as* the deed of Vasquez and wife to Labaume does not *purport to rescind*, and is not inconsistent with the former conveyance to Hanley. It merely passes their interest in the land. 1 Law Lib., Platt on Covenants, page 47, and 48.

V. If she has rescinded at all, she has rescinded as to all the family arrangement; and our instruction on that subject ought to have been given. 1 N. H. 73.

There was evidence tending to prove such a family arrangement; and in if Mrs. Vasquez broke it up by revoking her conveyance, then the conveyance to her, which was the consideration should be considered as nullified by the same act.

VI. She has affirmed the sale to Hanley. 6 Conn. Rep. 494, 8 Tann. 35; 2 Kent's Com. 195, Lecture 31, p. 233, 236, 238, 239; 5 Yerger 41.

Thirty years continuous possession under the deed to Hanley, with the knowledge of Vasquez and wife, ought to bar them.

W. L. WILLIAMS, for appellee.

1. The deed from Vasquez and wife to Hanley, on account of her *infancy* at the date of its execution, was either *void* or *voidable*.

2. If it were merely voidable, the deed to Labaume avoided it.

3. *No laches* could be imputed to Mrs. Vasquez while she remains *feme covert*.

4. No statute of limitations commenced running against her till the death of her husband. In support of my first and second propositions, I refer to the following authorities: Thom-

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as Coke, Vol. 1, pp. 177, 178, 179, note (K); 2 Vol. p. 219; 4 Ba. Ab. 354; 4 Cruise 17; Bingham on Infancy, title "Law of Coverture;" Watkins on Conveyancing, (by Preston) p. 285, and Library Vol.; McPherson on Infants, pp; 298, 465; Youch vs. Parsons, 3 Bur. p. 1794, (1806) Hoyle vs. Stow, 2 Dev'x. and Battle's law R. p. 320; Bool vs. Mix, 17 Wendell, p. 120; Jackson & Burchin 14 Johns. R. 123; Klime vs. Beebe, 1 Com. R. (2 series) p. 494; Sanford vs. McLean, 3 Paige, p. 117, Jackson vs. Carpenter, 11 Johns. R. p. 539; leading Am. cases, 1 Vol. p. 114, note and cases cited, p. 107, 109; Lessee of Drake and wife vs. Ramsay et al., 5 Ohio R. 251; Phillips and wife vs. Green, 3 A. K. Marshall, 7, (935;) Dearborn & Eastman, 4 N. H. R. p. 441; Roberts vs. Niggin, 4 N. H. R. p. 73; McGill vs. Woodward, 3 Brevard, 401; Supt. to Am. Digest, 2 Vol. p. 161; Tucker vs. Moreland; 10 Peters, p. 70.

In Wheaton vs. East., 5 Yerger, 41, 62, it is held that a deed of bargain and sale, acknowledging a pecuniary consideration, is not on its face prejudicial.

The rule of the civil law is most reasonable. 1 Domat. 512, sec. 24.

My third proposition is fully adjudged in the following cases: Tucker vs. Moreland, Lessee of Drake vs. Ramsay; Boddy vs. McBenna, 23 Maine R. (10 Ship.) 523; Clamorgan vs. Lane, 9 Mo. R. 472. Deed passed life estate, &c., as against *feme covert* incapable of conveying without assent of husband, no *laches* can be imputed until disability is removed.

Spanish law had provided for every imaginable case—marital, parental, and all social rights—mode of acquiring property, and its transmission by descent, purchase or devise, were all provided for. The age of majority was fixed—which governed Spanish or common law? If the former, all the statutes and common law introduced by this act, amounted to nothing. McNair vs. Lindell, 4 Mo. Rep. 380; McCabe vs. Heirs of Hunter, 5 Mo. R. 357; Picotte vs. Cooley, 10 Mo. Rep. 312.

The common law, as matter of fact and history, existed, and was the generally received system, long prior to 1816. This is evident from the territorial laws. Ter. laws 1 vol. p. 178; "Dower" p. 61 90.

Prescription of four years does not apply where the deed is a nullity. Francois vs. Delavan 8 Martin 619; O'Conner vs. Barri 3 Martin 446; Chaud's heirs vs. Saddle 10 Martin 726; Gayoso de Denas vs. Garcia 2 Com. L. R. 474; 4 L. R. 870.

The wife could not, by the Spanish law, appear in suit without the consent of her husband; and in that respect, the disabilities by both codes were the same, and neither could require her to do impossibilities. 1 White Comp.; 1 Donet 505.

By Louisiana code, prescription is suspended in every case, where the action of the wife may be prejudicial to the husband. 2 Vol. 528 art. 3491.

But if the Spanish law did prevail, and the age of majority was by our statute fixed at 21. The act of limitations of 1818, abolished all prescriptions. The four years invoked by plaintiff in error was a prescription, and was abolished. Landes vs. Perkins, called the Clamorgan case.

See judge Ryland's decision this term, wherein the common law is said to have been introduced by act of 1816.

HAIGHT for appellee.

In the exposition of a statute, the leading clue to the construction to be made, is the intention of the legislature, and that may be discovered from different signs. As a primary rule, it is to be collected from the words: when the words are not explicit, it is to be gathered from the necessity and occasion of the law, being the causes which moved the legislature to enact it. Duanis on statutes 694; 7th Vol. Law Library as there published page 42.

A remedial act shall be so construed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy. Ibid.

A statute made pro bono publico, shall be construed in such manner that it may as far as possible

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attain the end proposed. The construction contended for defeats the end proposed. On this construction the second section was useless, and unnecessary. 1st Ten. laws page 440 sec. 6—titles—this was unnecessary also. Statutes in pari materia explain each other. McNair vs. Lindell 4th Mo. 380; McCabe vs. heirs of Hunter 7th Mo. 355; Ibid Moss vs. Anderson.

The deed from Joseph Vasquez and wife, so far as the wife was concerned, was void by reason of her infancy at its date. Thomas Coke Vol. 1 177, 178, 179, note 41; Vol. 2, 219; 4th Cruise Dig. 17; Watson on conveyancing, by Preston 285; McPherson on infants 465, 298; 2 Deb. and B. 320 (N. Carolina;) 1 Preston on abstracts 323; Jackson vs. Buntene 14th John Rep. 124.

In a note to leading American cases, vol. 1 page 103, the American law is discussed.

In Wheaton vs. East, 5 Yerger 41, 62, it was held that a deed of bargain and sale acknowledging a pecuniary consideration, is not on its face prejudicial. The rule of the civil law from whence the middle ground principle was borrowed, is more reasonable. It adjudges all conveyances by an infant of his unavailable property prejudicial. 1st Strachans Domat 512 sec 24.

If the deed to Hanley was not void, but merely voidable, the general proposition that a conveyance by an infant may be avoided by any act of equal solemnity with the original conveyance is undeniable. Cases before cited and Tucker vs Moreland, 10th Peters 70; Jackson vs. Carpenter 11 John Rep. 529; 14th Ibid *Sapra* leading American cases, vol. 1 114, note and cases cited; Lessee of Drake and wife vs. Ramsey and others 5th Ohio Rep. 251; Philips and wife vs. Green 3d A. K. Marshall 7, 935; Dearborn vs. Eastmon 4th N. Hampshire 443; Roberts vs. Wiggin 1st do 71; 5th Monroe.

McGill vs. Woodward 3d Brevard's 401 Supt. to American Digest, Vol. 2, 161. The case of Bole vs. Mix 17th Wendell 120, does not sustain any different principle.

No lapse of time in asserting the right of disaffirmance or avoidance of a deed made during infancy will amount to a ratification. Tucker vs. Moreland *supra*; Lessee of Drake vs. Ramsly *supra*; Boody vs. McKinney, 23d Maine 517, 523; 10th Sepley is the same report; Clamorgan vs. Lane 9th Mo. 472.

By the civil law and Spanish law the deed of a minor is void when it wants the forms of law and a just cause and the prescription or 4 years does not apply to cases where the deed is a nullity. 8 Martin 630, 3d do. 446, 10 do. 726; Gayoso de Lewas vs. Garcia, 2nd Vol. Con. Rep. 474; 4 Louisiana 370.

The statute of limitation passed in 1818 put an end to proscription of all kinds. Of this there cannot be any doubt. After 1818 there were no bars by lapse of time except such as that statute created. The limitation to this action is called prescription. 1 Domat 504; see also cases cited from Louisiana *Repts.*, as to resissions and restitutions; Domat 502, Vol. 1 and the following pages.

As to jointures, gift of husbands, &c., being dote arras and Puraphernalia, 1 Vol. White's N. Recopi; Prescription *ibid* 95; Promise by a minor is void unless to his advantage. *Ibid* 151 compendium of the Royal laws of Spain from the institutes of Alvarez, being a history of the various Spanish codes; 1 Vol. White's Com. 352.

As to the form by which a feme covert must convey her estate see translation from Partidas, 3d Part Tit. 18 Law 58, page 269. The deed in this case to Henly is void under the Spanish law for want of form. See also 1 Martin, 611

That no contract deed or obligation by a minor shall be valid nor any oath be made according to lib. 10 Tit. law 17 page 5; see translation from the Nooissima Recopelacion.

A conveyance by a minor being one over 14, must be for a just cause, and that must appear on the deed.

Judge NAPTON delivered the opinion of the court.

For the purposes of this case, it does not seem to be material to determine, whether the territorial legislature in 1816 succeeded in introdu-

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cing the common law, to the exclusion of the Spanish law or not. In the case of Lindell vs. McNair, (4 Mo. Rep. 380) this court held, that a deed of bargain and sale, executed in 1810 by a husband and wife, and acknowledged according to the forms prescribed for such deeds, when designed to convey the husband's land and the wife's dower, would convey the wife's land, although previous to the act of June 22d 1821, there was no statute of this State or territory expressly authorizing such a conveyance. The court considered the Spanish law to be still in force after the passage of the act of 1816, and as that law authorized a husband to convey his wife's paraphernal property with her consent, the deed executed in 1820 was upheld. It was also asserted that the deed was good at common law. As this decision was made as early as 1836, and may have formed the basis of many titles acquired upon the faith of it. This court in a late case (Picott vs. Cooley 10 M. R. 312) intimated that it ought not to be disturbed.

If the grounds upon which the decision of the case of Lindell vs. McNair was placed are to be adhered to, as well as the decision itself, it would appear that the act of 1816, which purported to introduce the common law to some extent, was a signal failure. To introduce a system of unwritten law for the purpose of supplying the deficiencies of another system of a similar character, supposed to be equally perfect and comprehensive as the first, making both systems subordinate to the written or statute law, was certainly an act of legislation either entirely nugatory, or if not nugatory, singularly calculated to produce confusion and uncertainty. The Spanish law, supposed to be in force here previous to 1816, was a system complete in itself, embracing all the subjects usually regulated by a municipal code, and providing for all the rights and remedies incident to every relation of life. If that code was left in operation by the act of 1816, except where the statute laws of the territory had altered it, the common law could only be applied to supply the defects of that system. Under this construction of the act, the operation of the common law must have been extremely limited, if indeed there was any ground at all for it to rest upon.

It is probable that the sudden introduction of the common law in 1816 might have been repugnant to the feelings and interests of the old inhabitants who had been familiar with another code. But the emigrants from the olden states, who regarded the common law as their heritage, and who in 1816 already constituted much the larger portion of our population, were doubtless anxious for the immediate acquisition of this system, and had practically regarded it as the law long before its formal in-

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troduction by the legislature. A reference to our territorial laws from the first acquisition of the country down to 1816, will show that the common law furnished our law givers all their notions of law and equity, as well as all the terms used to express them. The deed from which this controversy has sprung, is a conveyance by bargain and sale, and it would seem that, at the date of its execution, the forms of conveyancing derived from the common law were practically in vogue, even among the ancient inhabitants.

Assuming the law to be as declared in the case of *Lindell vs. McNair*, that in November, 1816, a husband and wife could convey by deed of bargain and sale the wife's land, the question is still to be determined whether the infancy of the wife, at the time of such conveyance, will avoid the deed or render it voidable, and if so, in what mode, or at what length of time it may be avoided.

At the common law, a married woman could alienate her land by fine and recovery; but such alienation might be avoided on account of the infancy of the wife. If, however, it was not avoided during infancy, it could not be afterwards avoided, for this conveyance, being by matter of record, must be tried by inspection upon writ of error. 3 Bac. Abi. Infant Ch. 1, sec. 7. A feoffment or other alienation in *pais*, might be avoided by an infant or his heir, at any time by entry, whether during his nonage or after his full age. Co. Litt. 380, b. So if the husband and wife aliened the land of the wife, both being infants, the wife after the death of her husband, was entitled to her writ of *dum fuit infra actatem*. And if they joined in an alienation where the wife only was an infant, after the death of her husband, she was entitled to her writ of *dum fuit infra actatem*, as well as her *cui in vita*. Fiti N. B. 192, K. Co. Litt., 237, a, Com. Dig. infant, c, 4 Bac. Abi.; Infancy 1, 7. But these writs must be understood as only applicable to alienation by feoffments, or other conveyances *in pais*, and could be brought only after full age, unless brought by an heir of the person entitled. Fiti N. B. 192, g.

This distinction between conveyances by matter of record, and those made in *pais* as feoffments, bargain and sale, are important in determining the force of a conveyance by husband and wife, made in 1816, after the passage of the act of the 19th January, upon the supposition that the common law was then in force. As our law now stands, it may be still more important, should a question arise as to the proper construction of a deed purporting to convey the wife's land. Our statute now reads: that "a married woman may convey any of her real estate by any conveyance thereof executed by her herself and husband, and ac-

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knowledged by such married woman, and certified in the manner herein-
inafter described, by some court having seal, or some judge, justice
or clerk thereof." It is not provided what effect such a conveyance shall
have, whether that of fine and recovery, or of a feoffement or bargain
and sale. If, however, we recur to the first act passed on this subject,
that of June 22, 1821, the question is readily solved. That act provided
that "such deed shall be as effectual in law to pass all the right, title and
interest of the wife, as if she had been an unmarried woman." As the
deed of bargain and sale made by an unmarried infant was voidable, it
followed that a conveyance by a husband and wife of the wife's land, du-
ring the minority of the wife, was also voidable. Our law remained in
this condition until the revision of 1835, when this statute, like many
others, was greatly changed in phraseology and put into a condensed
form. The effect of deeds of this character was entirely omitted. I
mention this, not with any view to enquire what is the proper construc-
tion of the present law. I shall assume that in 1816, before the common
law had been changed by any special enactment, no greater effect could
with propriety be given to a deed conveying the lands of a married
woman, than was subsequently given to it by the act of 1821. In Lin-
dell vs. McNair, the court do not intimate whether the conveyance was
equivalent to a feoffment or a fine and recovery. As there was no
statute on the subject, and the form of the conveyance was a bargain
and sale, it could hardly have been understood to have the force of a
fine and recovery. If the deed, therefore, of Vasquez and wife in 1816,
is to be construed by the common law, it was at least a conveyance
which could be avoided by reason of the infancy of the Mad. Vasquez.

By the Spanish law, a husband could convey his wife's paraphernal
property, with her consent. There is no doubt the land owned by Mad.
Vasquez was paraphernal. It has not been questioned, in the argument
of this case, but that the husband's conveyance of his wife's land, she
being an infant, could be avoided by the wife, at the Spanish law, as
well as by the common law. It is laid down in Frebero, (3 Feb. sec.
36,) "If the husband sell paraphernal property, without the consent of
the wife, for a full price, she can recover it from the purchaser, for she
does not lose its dominion, inasmuch as one man's property is not to be
transferred to another without the owners consent." Now by the Span-
ish law a minor, above the age of fourteen but under twenty-five, might
sell his property, and the sale was translative of title *sub modo*, but he
had the privilege of subsequently rescinding and suing for the property.
So a married woman, under age, although her consent to the transfer of

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her property might be sufficient to pass the title for the time, could dissent after arriving of age. She had the same action for restitution which the Spanish law gave to minors generally. As this action was limited to four years after attaining majority, the question is whether this limitation affected a minor married woman.

In Chesman's heirs vs. Saddler, (10 Marten L. R. 735) judge Porter said : "The law on this point I understand to be, that if the minor, after he comes to the age of majority, expressly ratifies the alienation, or tacitly approves of it, either by suffering the time prescribed for him to commence his action to expire, or by doing acts in conformity with the transfer of his property, that he cannot afterwards claim it. Because, in the language of the law, the intention which is inferred from the act is more powerful than that which can be ascertained from words."

This action for restitution is given when the minor's estate has been sold according to the forms of law ; by it, he was enabled to redeem the property, by re-paying the price. As the laws of Spain did not permit a minor's estate to be sold except under special circumstances, and then under the direction of a judicial officer. The minor was allowed four years after coming of age to have his action for recovering back the property, where the law was not strictly complied with. In O'Conner vs. Bane, (3 Marten 453) it is said : "A tutor has not the power of alienating the real estate of his pupil, except in the cases provided by law, and then only with permission of the judge. If contrary to this provision, he alienates it, the minor may within four years after he comes of age, obtain restitution of his property, on proving that the alienation has been injurious to him. (Partidas 6, 1 lib. 2.) But when he has suffered the four years to elapse, without claiming any restitution, his silence is considered as an approbation of the act of his tutor, and the purchaser of his property is quieted in his possession." This writ or action for restitution was also given where the minor himself had made the alienation.

It might be a question, whether this limitation of four years would run against a married woman, whose lands had been sold during her minority, but the very limited examination which I have been enabled to bestow on this subject, has led me to the conclusion that it does. It is certain, that the prescription of ten years originating in a just title and good faith will run against a disposition by the husband of his wife's paraphernal property—(3 Feb. lib. 3 ; Ch. 2, 3, 4,) and I see no reasons why a similar limitation should not attach to the wife, after the removal

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of her disability of infancy. In the case of O'Conner vs. Bane (3 Marten) the point was made, but as the prescription of ten years was proved, the court did not examine the other question, and would not permit the ten years prescription to apply, because the land of the minor had been sold by the mother, after she had married a second time, and by such marriage forfeited her rights as tutrix.

Admitting that the married woman, where paraphernal property have been conveyed by her husband during her infancy, must under the Spanish law bring her action for restitution within four years after she comes of age, notwithstanding she continues married. Let us examine the facts of the present case, and see how this limitation will affect the result.

The conveyance of Vasquez and wife to Hanley, was executed on the 4th November, 1816. Mad. Vasquez was born on the 2d May, 1798, and was consequently twenty-one years old on the 2d May 1819.

The act "for the limitation of actions to be brought for the inheritance or possession of real property," was passed on the 17th Dec. 1818. That act, provided, that "no person should have any writ of right, or any other *real or possessory writ or action*," except where the session or possession upon which the action was to be maintained, had been within twenty years before the suit; and further, that "any person or persons now having right or title of entry as aforesaid, and the heir or heirs of such persons may within twenty years from this time enter or commence any such action or suit as he, she or they, or his or her or their ancestors might have done before the passing of this act." This act undoubtedly abolished the prescription of ten years, which prevailed under the Spanish law, and such was held to be the law in Landes vs. Perkins (12 Mo. R. 238.) Did it not also abolish the limitation upon the action for a restitution of lands sold by a minor? If the Spanish law was in force in 1818, and by virtue of that code an action could have been maintained at that period for the restitution of lands sold during plaintiff's minority, that action, by whatever name it may have been called, was in substance and effect, a real action. It was an action to recover the possession of lands, and therefore came within the letter and spirit of the act of limitations. It will not do to say that the act was intended to apply only to common law actions; for if the admission be made, that such was probably the intention, it only proves that the legislature acted on the presumption that no other kind of actions were known to our courts, or recognized by our laws. The argument would therefore prove too much: it would show that the leg-

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islature did not intend to limit the period of commencing a proceeding under the Spanish law, only because they believed the common law to have been introduced two years before, and the Spanish law abolished. But if the Spanish law and common law were both in force in 1818, Madam Vasquez had a right to this action of restitution before some tribunal of the territory, and the action was strictly a possessory action. It cannot be supposed for a moment, that a party who had a claim for land, designated by a name known only to the Spanish law, was intended to be barred, and was barred, whilst at the same time he could give his claim another name, and bring his suit in a common law tribunal.

It surely cannot be denied, that in 1818, Madam Vasquez could have maintained a common law action for the recovery of her land; for those who maintain the continued existence of the Spanish law in this territory after 1816, seem to concede that it existed only for the protection of rights, not to control the remedies, or dictate the forms of action in our judicial tribunals. Our legislative and judicial history conclusively establishes, that no tribunals were constituted here for administering the Spanish law, in its forms, and no suits were ever maintained in any other mode than that known to the common law. Our judges and lawyers were educated in this system, and our legislature was thoroughly imbued with its spirit. If, then, Madam Vasquez could have maintained a common law action for the restitution of her land in 1818, that right of action, by whatever name it was called, was protected by the act of limitations—that protection extended to 1825, when the common law was beyond all question fully introduced.

We must therefore conclude that the principles of the common law must settle the right involved in this suit.

The deed under which the plaintiff claims, was executed by Vasquez and wife in 1846, and the only question is, whether this deed, made thirty years after the first, was effectual to rescind the forms and pass the estate to the plaintiff.

It would be useless, at this day, to examine the much discussed distinction between the void and voidable acts of an infant. The modern doctrine, which originated in the case of *Louch vs. Parsons*, and which hold the deed of an infant to be merely voidable, is certainly more consonant to natural justice, than the harsher rule which was thought to have prevailed previous to that case. The deed of Madam Vasquez in 1816, was then voidable only. Is her silence, her acquiescence during thirty years a bar? Can the mere inaction of a feme covert, however long continued, amount to an affirmation of a voidable contract? Such

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would have been the Spanish law, as we have seen ; but under our system, the disabilities of a feme covert are greater than that under the civil or Spanish code, and as a consequence, her responsibility is diminished, and her privileges are more extensive and better protected. No statute of limitation barred Madam Vasquez, and no act was done by her to affirm or ratify the deed of 1816. She was merely passive. The fact that she lived in the city where the lot in controversy lies—that she was probably aware of the improvements going up : that she made no objections, and put in no claims ;—these circumstances, whilst they might affect the equitable character of the transaction, can hardly be regarded as an affirmation. The case of Wheaton vs. East. (5 Yerger 59) is a very strong case upon this point ; but it was essentially different from the present. A confirmation was deduced from the conduct of the plaintiff in that case, scarcely warranted by the general current of authorities. The plaintiff lived in the neighborhood of the lot he had sold during his infancy—saw the defendant making large expenditures in valuable improvements—said he had sold the lot, had been honorably paid for it, and was satisfied, and make a proposition for its purchase to the defendant. These circumstances were held to preclude him from subsequently setting up title. But Madam Vasquez has been merely inactive, and during the entire period of her silence has been a feme covert. The generally received doctrine undoubtedly is, that mere words, much less mere silence or inaction, will not amount to a ratification of a voidable deed. Clamorgan vs. Lane, 9 Mo. R. 473.

It seems to be well settled, that an entry upon the land is not necessary to avoid a deed made during infancy, but it may be avoided by a deed executed to another for the same land after arriving at full age.

The other judges concurring, the judgment of the court of common pleas is affirmed.

THE STATE OF MISSOURI vs. KESSLERING.

THE STATE OF MISSOURI vs. KESSLERING.

If an indictment upon the statute concerning "billiard tables," describes the offence in the words of the act, it is good.

APPEAL FROM THE ST. LOUIS CRIMINAL COURT

STRINGFELLOW, for appellant.

The criminal court has jurisdiction. The terms "crime," "offence," and "criminal offence" used in any statute, mean any offence punishable by fine or imprisonment, or both.

Sect. 39, Art. 9, concerning crimes and punishments, Rev. Code, 1845, p. 415.

The acts charged are not double in the sense which vitiates an indictment. The acts charged constitute the same offence. It has been repeatedly held that several distinct acts of *selling* may be charged in the same count against a grocer or dram shop keeper, so several assaults may be charged in one count. It is submitted that the only case in an indictment for misdemeanors, in which distinct offences cannot be joined, is that in which the punishment for such offences is different. In indictments against dram shop keeper, ferry keepers, and for keeping gambling devices, it is the invariable and approved practice to charge several acts, each of itself sufficient to warrant a conviction. 15 Pick. 274; 9 Wen. 193; 1 Ch. Cr. law, 254; State vs. Buford, 10 Mo. R. 704.

3. It is not necessary to charge ownership. A lessee of a table, or an agent of the owner, is as liable as the owner.

Judge RYLAND delivered the opinion of the court.

This was an indictment against the defendant, John Kesslering, upon the statute concerning "billiard tables." The fifth section of the act is in the following words: "Every person who shall keep or permit to be used and kept, any billiard table, without having a license therefor, shall forfeit and pay four hundred dollars for the use of the State, to be recovered by indictment." The indictment in this case is in the following words, viz:

STATE OF MISSOURI, } ss. St. Louis Criminal Court,
County of St. Louis. } January Term, 1848.

"The grand jurors of the State of Missouri, within and for the county of St. Louis, now here in court, duly empanelled, sworn, and charged upon their oath, present that John Kesslering, late of the city of St. Louis, in the county of St. Louis aforesaid, on the first day of March in the year of our Lord one thousand eight hundred and forty-seven, and on divers other days and times, between that day and the day of the finding of the indictment, at the city of St. Louis aforesaid, unlawfully did keep

THE STATE OF MISSOURI vs KESSLERING.

and permit to be used and kept, a billiard table, without then and there, and on said divers other days and times, having any license therefor, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

D. N. HALL,
Circuit Attorney."

The defendant was arrested by virtue of a capias issued on this indictment, and appeared to the indictment and filed his demurrer thereto, setting out as causes of demurrer, "that the said declaration is double, in this, that it charges said Kesserling with keeping a billiard table, and also for permitting to be used and kept a billiard table without license therefor, and that said indictment is in other respect informal and insufficient in law."

The court sustained the demurrer to said indictment, and the State brings the case before this court by appeal.

The only point, therefore, before this court is the sufficiency of the indictment. The offences in this case is created by the statute ; and all the acts that constitute it are set forth in the statute, and it is only necessary for the circuit attorney to charge the offence in the words of the statute. In the case of Tully vs. The Commonwealth, 4 Metcalf Rep. 358, chief justice Shaw says : "When the statute punishes an offence, by its legal designation, without enumerating the acts which constitute it, then it is necessary to use the terms which technically charged the offence named at common law. But we think this is not necessary when the statute describes the whole offence, and the indictment charges the crime in the words of the statute."

The indictment is in the words of the statute, and the circuit attorney has used both clauses mentioned in it, either one of which is an offence. The defendant complains because he is thus charged. We think there is nothing in the objection which he makes. In the case of Stous vs. The State, 3d Vol. Mo. Reports, page 9, this objection is made and considered by this court as having no force in it. We deem it not necessary to take any further notice of this objection. In misdemeanors rigid nicety is never exacted. Here the offence is charged in the words of the law, and instead of the circuit attorney having two counts in his indictment, he has included the whole, "the keeping" and "the permitting to be used and kept," in one count. According to the principles laid down in the case of Stous vs. The State, above cited, the defendant at least has no cause to complain; it is better for him, and I do not feel disposed to lend a willing ear to such technical objections.

LINTON & GEORGE SAPPINGTON vs. WILLIAM BOLY.

If a person be the owner of a billiard table, and for his private amusement should have it put up in one of the rooms of his residence, where his family and his visitors amuse themselves playing thereon, I should suppose that the court (should he be indicted for this) would instruct the jury, upon request, that such "keeping," and such "permitting to be used and kept," were never designed by the legislature to be punishable by indictment.

The criminal court has it in its power, and I doubt not will always cheerfully use it to restrain unwarrantable interference by grand juries, should such ever present itself. Let the defendant then call on the court for instructions, whenever he supposes the charge is not made out against him according to the obvious meaning and intent of the legislature. If we require the circuit attorney to go out of the statute to make averments of acts not named therein, we know of no criterion to which he can look as a guide.

The criminal court then erred in sustaining the defendant's demurrer to this indictment. Its judgment is reversed, and the case remanded for further proceedings, not inconsistent with this opinion.

LINTON & GEORGE SAPPINGTON vs. WILLIAM BOLY.

An unsealed instrument of writing conveying land in trust to secure the payment of a debt, is not sufficient *per se*, to authorize a sale and conveyance of the land by the trustee.

An unsealed instrument of writing conveying land in trust to secure the payment of a debt, creates an equitable lien upon the land, which can be enforced by a court of equity.

APPEAL FROM JEFFERSON CIRCUIT COURT.

Judge BIRCH delivered the opinion of the court.

To secure the payment of certain moneys to become due to the appellee, the appellants executed to him an unsealed instrument of writing, purporting to convey to him, in trust, certain lands, which, in default of

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payment, he was authorized to sell, and appropriate the proceeds, in payment of the debt they owed him.

Some years afterwards, Boly proceeded to sell the land pursuant to the terms of said instrument—becoming himself the purchaser. Being advised, however, that a purchase thus made by himself was invalid, he advertised the land anew, and it was purchased at the second sale by one Burns, who subsequently conveyed it by quit claim to Boly. Having again taken counsel upon the subject, and very properly distrusting the validity of a title thus acquired, he brought his bill in chancery, reciting the facts stated, and others not necessary here to consider, and prayed a decree of title, and of general relief.

The decree finally rendered was in accordance with the specific prayer of the bill—vesting the title of the land in Boly—and also for the difference, in money, between the sum the land sold for at the second sale, and the sum due him by the appellants—and from this they appealed.

Passing over the testimony respecting fraud alleged to have been practised towards the appellants by the appellee, in the original sale of the land, (upon which we deem that the chancellor might well enough find, as he did, that it was not made out,) it is sufficient to remark that the unsealed instrument, being but an equitable lien, and hence insufficient, *per se*, to authorise the sale and conveyance of the land in controversy, an unauthorized proceeding under it cannot be helped out in the manner decreed.

The proper course would have been, to have gone at once into a court of equity, with a prayer to subject the land to sale under a decree of the court, for the purpose of discharging the debt found due by the recital of the instrument.

This would have been in accordance with the equitable intent of the parties, and seems to us to be the extent to which the decree of the circuit court should have gone, under the general prayer of the bill which was subsequently brought.

The decree of the circuit court is therefore reversed, and the cause remanded, to be proceeded in conformably to this opinion.

STEAM BOAT SEA BIRD vs. FRANCIS BEEHLER.

STEAM BOAT SEA BIRD vs. FRANCIS BEEHLER.

Plaintiff acquired a lien against the steam boat "Sea Bird," under the statute of this State, for stores and supplies furnished her. After plaintiff's lien accrued, suit was instituted against the *owners* in the State of Louisiana. The boat attached and sold to satisfy the judgment.

Held: That this sale of the boat did not divest plaintiff's lien.

ERROR TO ST. LOUIS CIRCUIT COURT.**STATEMENT OF THE CASE.**

The defendant in error brought his action under the statute to recover \$401.90, alleged to be due him on account of stores and supplies furnished the boat. The defendant pleaded, first the general issue, and second, a special plea setting forth, in substance, that after the plaintiff's lien accrued, and before institution of this suit, the said boat had been seized by virtue of process of the commercial court of New Orleans, at which port the boat then was, and was subsequently sold at New Orleans, by the sheriff, under an order of said court, in conformity to the laws of Louisiana, to Rogers & Brothers, and at the date of said sale, the said Beehler had no lien upon said boat which was valid, or could be enforced in Louisiana under the laws of that State, and that according to the laws of that State. The title acquired by Rogers & Brothers was a good and valid title as against the plaintiff's lien. This plea was demurred to, and the demurrer sustained.

The plaintiff below obtained judgment: the defendant moved a new trial, which was refused and exceptions taken, and the case brought to this court by writ of error.

CROCKETT & WHITTLESEY, for plaintiff in error.

In this case the main point presented is the effect of a judicial sale of a steamboat in another state by virtue of its laws, upon the title of the owners and the liens of creditors. The plaintiff in error contends, that if the facts stated in the special plea are true, that the judicial sale divests all previous liens, and passes a good and valid title to the purchaser under the judgment, execution and sale. Judgments upon attachments are to be likened to proceedings in rem, and in admiralty. The court have so decided in the case of steamboat Rariton vs. Smith, 10 Mo. R. 527, in which the court say that "it feels itself called upon to look for a guide to that system from which the idea of proceeding *in rem* had its origin, as we must suppose the general assembly, in borrowing a remedy from the maritime law, would expect the courts to look to that law for principles of decisions in cases not provided for by the statute." They farther say, "If a judicial sale was ordered and made, the purchaser, under such sale, took the vessel freed from all liens. In the case of Dobyns vs. sheriff of St. Louis, 5 Mo. R. 256; steam boat Genl. Brady vs. Bulsly, 6 Mo. 558. The court decided that the lien of an attaching creditor, levied in virtue of an attachment against the owners of a boat, took precedence of the liens upon the boat itself, upon which the boat was subsequently seized. This is in accordance with the well known principle, *qui prior est in tempore petior est in jure*. In case of Finney et al. vs. st. bt. Fayette, 10 Mo. R. 612, the court re-affirm the doctrine established in the case of st. bt. Rariton vs. Smith, and decided that a judicial sale will divest the liens in whatever jurisdiction it may be decreed. The consequences of the opposite principle would be outrageous, a purchase at a judicial sale could never know when he bought a good title and the purchase at such a sale would be nothing but gambling upon the chances of

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liens and suits in other States. The judgment of a court of admiralty jurisdiction is final every where, where it had jurisdiction of the subject and is binding upon all parties—Hughes vs. Cornelius 8 Shower Rep. 232, 2 Smiths S cases 424; Gelston vs. Haigt 3 Wheat R. 246; Geyer vs. Aguilar 7 T. R. 681; Beering vs. Royall Ex. Ins. Co. 5 East R. 99; Oady vs. Bevil 2 East R. 472; Rose vs. Hinckley 4 Cranch 269, 270.

2. If the judicial sale under the laws of Louisiana passed a title voted there and paramount to the plaintiff's lien, then the same effect must under the law, be given to it in all the other States, and the title of the Rogers will be valid every where and defeats all previous liens—see cases and authorities quoted above.

3. The plaintiff's lien as alleged in the plea, was not valid and could not have been enforced in Louisiana. If as the boat being within her jurisdiction, was liable to the process of her courts and was liable to be dealt with according to her laws; and having been sold under the process of her courts, the title thus acquired, by the purchaser, is better than the plaintiff's lien; and public policy requires that such sales should be protected. A judgment in rem is conclusive against all the world, 2 Smiths L. C. 439; Geyer vs. Aguilar 7 T. R. 696; Scott vs. Sherman 2 Bl. R. 977 and cases cited above. Mills vs. Dryer 7 Cranch 481, 487.

GOODE & CLOVER for defendant in error.

1. The demand of the plaintiff by the express law of this State, was a lien on the boat,
 2. The claim under which the boat was sold in the State of Louisiana, was a mere general demand against the owners of the boat there and had by the laws of that State no priority over other claims, was no particular lien upon the boat which was to be enforced by proceedings in rem. Though this court has decided in the case of Finney, Lee & Co. vs. Steamboat Fayette 10 Rep. 613, that a judicial sale in another State founded on a claim which by the laws of that other State is named as a specific lien, will divest a lien given by the laws of our State, yet the case at bar is materially and importantly different in the fact that the judgment was rendered not against the boat but against the owners thereof and was not founded on a claim which was a lien on the boat. It is evident from the reported decisions, that were this case pending in the State of Louisiana and the boat had been sold under similar proceedings in the State of Missouri, that the courts of that State would give effect to the plaintiff's claim here, upon what ground then can the courts of our own State refuse to give its aid and assistance to its own citizens? Ohio Ins. C. vs. Edmonson, Louisiana Rep.

Judge NAPTON delivered the opinion of the court.

To this action instituted under the provisions of our act concerning boats and vessels, the defendant pleaded, that subsequently to the lien of the plaintiff a suit was instituted by attachment in Louisiana against the owners, and a judgment obtained against the owners "with privilege on the property attached" that the boat was sold under the proceeding and Rogers & Co. became the purchasers.

The only question is, whether this judicial rule in Louisiana divested the plaintiff's lien. The opinion of this court in the two cases of steam-boat Raritan vs. Smith and Finney, Lee & Co. vs. S. B. Fayette, was based upon principles of public policy and supported by legal analogies.

STEAM BOAT SEA BIRD vs. FRANCIS BEEHLER.

In the latter case, the sale was made in Illinois under a law somewhat similar to our statute.

It is evident that the judicial rules in maritime proceedings, are essentially different in their results from an ordinary sale under an execution upon a judgment at law. The maritime proceedings alluded to, were strictly *in rem*, and a sale of the vessel was made for the benefit of all whom it concerned. This is the case under our statute as it now stands. There are obvious reasons which require such sales should convey a clear title, freed from all prior incumbrances, and which have no applicability to sales under executions at law, whether the proceedings upon which the judgment founded be *in rem* or *in personam* or both *in rem and personam*.

That a judicial sale of a boat or vessel, under our law as it now stands, or under the law of a sister state of a similar character, would convey a title clear of all prior liens, there can be no question; but if we carry the principle further, and hold that a sale in Louisiana in an ordinary suit by attachment, under laws which make no provision for the application of the proceeds of such sale to the payment of any debt other than one upon which the suit was founded, and in the enforcement of which the rule was made, we destroy the rights of our citizens who are creditors, without securing any benefit to the purchaser in Louisiana, further than an exemption from such claims as may exist in Missouri. There can be no doubt that in Louisiana such a judicial rule as is set up in the defendant's special plea, would not divest liens acquired in that State, nor would it divest liens acquired in Kentucky or Ohio. The purchaser would be secure so far as Missouri creditors are concerned, but no further. Our citizens would be the only sufferers, and the purchaser would gain nothing except to the extent of the liens acquired here. The principles of international comity do not inculcate such a sacrifice.

The doctrines of the maritime law in relation to judicial sales of libelled vessels, are an exception to general principles. The exception is founded not only on principles of public policy, but is entirely consistent with the most rigid justice. Such sales are not made for the benefit of any particular creditor, but for the benefit of all persons interested. Provision is made for the distribution of the proceeds, pro rata, among all who will come forward and establish their claims within a specified time. The proceeding is entirely *in rem*, and all the world are bound by it. But what analogy is there between such a sale as this and an ordinary sale under an ordinary execution. Such executions are solely for the benefit of the party plaintiff, and can only operate upon the title

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of the party defendant. A sale under these, merely conveys the title of the defendant in the execution.

The liens of strangers are not divested. If it were so, their rights must be divested by a proceeding to which they are not parties, of which they have no notice, and in the benefits of which they could not participate if they did have notice.

We do not understand, therefore, that the prior decisions of this court are designed to embrace all judicial sales, but only such as are made here or elsewhere under proceedings analogous to those of courts of admiralty, in which any number of claimants may unite in libelling a vessel, and in the benefits of which, not only these claimants and all others who choose may participate.

Judgment affirmed.

AUGUSTUS DUFRAS vs. JOHN WASHINGTON.

The "law commissioner of St. Louis county" has not jurisdiction of actions for false imprisonment.

ERROR TO ST. LOUIS CIRCUIT COURT.

GARESCHE for plaintiff.

Has then the law commissioner jurisdiction of an action of trespass for false imprisonment?

We contend that he has not, and refer the court to the act entitled "an act supplementary to an act entitled "an act respecting the law commissioner," approved February 4th 1847." See session acts '46, '47 p. 91. By the first section of this act concurrent jurisdiction is given to the commissioners with justices of the peace in all actions and proceedings mentioned in 2d and 3d sections. 1st art. of an act to establish justices courts, and regulate proceedings therein, approved 26th March 1845, and he is made "subject to the same rules and regulations which apply to and regulate proceedings in justices courts."

Sec. 3d of the 1st article mentioned concerning justices courts, forbids a justice of entertaining any action for false imprisonment. This we submit is as binding upon the law commissioner as upon any justice of the peace.

GEO. R. TAYLOR for defendant.

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The trial took place upon the first of May, and the motion in arrest was filed on the seventeenth, more than four days after the judgment and verdict, while the statute, Rev. code 1845, p. 829 sec. 1, requires that they shall be filed within four days, so that the motion came too late.

The next question is, upon the motion to set aside for irregularity. Now what is the irregularity complained of? The defendant appeared to the suit below before the law commissioner, appealed and appeared in the circuit court; in both of which courts judgment was given against him upon the merits—so that there was no irregularity. The only question that can arise, is the question of jurisdiction, and the irregularity arising from the want of it. By the common law, the action takes its character from the writ, and the writ in this case is trespass for assault and battery; the charge for false imprisonment may then be stricken out as surplusage, and the action stands for assault and battery. The complainant charges that the defendant beat, bruised, and injured the plaintiff, and is, in all its character, for assault and battery, and of this action the commissioner has jurisdiction. The exception not having been taken below, as part of the declaration was good, the judgment will not be reversed because part was bad: but the judgment will be allowed to stand. Rev. code 635 sec. 3, justices have jurisdiction of actions for injuries to persons or property.

In this case, the suit is not prosecuted for false imprisonment, under an illegal process, or an erroneous process. The question of false imprisonment does not therefore arise. It is simply an injury to the personal rights of another by an assault without authority of law, without process of a court, and of the mere will of the defendant, who chose to make the law for his own occasion.

But farther in this case, the defendant, as appears by the record, paid and satisfied the judgment before the motion for a new trial was filed, and long before the motion in arrest, and is worth the while to have the matters agitated in this court, so long after the matters have been settled.

For these reasons, the counsel for defendant in error submits, that the judgment of the court below should be allowed to stand.

Judge BIRCH delivered the opinion of the court.

This suit was originally instituted before "the law commissioner of St. Louis county," where Washington, the plaintiff below, had a judgment, as he had subsequently an appeal to the circuit court.

Upon examining the record, the declaration is perceived to be, in substance and in form, for trespass, false imprisonment—and the law commissioner having no jurisdiction of such a case, the judgment of the circuit court must needs be reversed, without reference to the time the motion was made, or any other consideration.

It is accordingly reversed.

SAMUEL INGRAM Adm'r. vs. MARGARET ASHMORE.

SAMUEL INGRAM ADR'R .vs. MARGARET ASHMORE.

Where a special contract is so far executed, that nothing remains to be done between the parties but the payment of the money, it may be recovered under the common counts in assumpsit.

ERROR TO ST. LOUIS CIRCUIT COURT.

STATEMENT OF THE CASE.

This was an action of assumpsit brought by Samuel Jackson in the St. Louis circuit court against the defendant in error, Margaret Ashmore. The declaration contains a special count, and all the common counts with a count stated. The basis of the action is predicated upon the sale and transfer of a bond or note transferred by the said Jackson to the said Ashmore, the property of the said Jackson, executed by one H. W. Carter and N. R. Sullivan, for the sum of one hundred and twenty-two dollars and thirty one cents, and is in the following words:

"Six months after date we, or either of us, promise to pay Samuel Jackson, or order, one hundred and twenty-two dollars and thirty one cents, with interest, at the rate of ten per cent. per annum from date until paid, without defalcation or discount, for value received, as witness our hands and seals this 29th Sept. 1842."

H. W. CARTER, [SEAL.]
N. R. SULLIVAN, [SEAL.]

The motive of the said Ashmore in buying said note, was as follows: She, the said Ashmore, had purchased of the said H. W. Carter and one Mildred Carter, his mother, five acres of land, and not having the money to pay them, purchased said note, so that it might be the same as cash to H. W. Carter, he being the maker of said note. The said Ashmore then agreed with the said Jackson that if he would let her have said note for said purpose, she would in place of it execute her own note of hand with good security to him, said Jackson, on or before the last day of April, 1844, for the said sum of \$122 31 cents, drawing interest at the rate of ten per cent. per annum from the said 29th day of September, 1842, until paid, as soon thereafter as requested by Jackson, or pay to the said Jackson by the last day of April, 1844, the aforesaid sum of \$122 31 cents, with ten per cent. interest per annum from said 29th day of September 1842, until paid. The said Jackson being desirous of accommodating the said Ashmore, let her have said note for said purpose, which note was taken and received by said Carter and his mother as payment for said land. Afterwhich, the said Ashmore adopted the latter part of the proposition of payment of said note, and paid to said Jackson a part of said note, in pursuance of her said contract, but failed and refused to pay the remainder of said note or bond. The said Jackson, some time after her refusal, commenced this action against her, and sued out an attachment to secure him, and attached the land purchased as aforesaid. In the declaration there is a special count upon the special facts of the contract, and the bond sold as aforesaid is described as a note instead of a bond, which it is. To the declaration the said Ashmore, by her counsel, demurred to the special count, but afterwards withdrew the demurrer, and filed non-assumpsit. The trial coming on, Jackson, by his counsel, by the instruction of the court to the jury, was compelled to take a non-suit, with leave to move to set it aside, and then excepted to the instructions given to the jury, and then moved the court to set aside the verdict and judgment given against him, based upon the said instructions given to the jury, but the court refused to do so. Jackson died afterwards: his administrator, said Samuel Ingram, has brought this case here, to this honorable court, by writ of error. The instructions are based, as contended, by a variance in the special count, and the note or bond sold as aforesaid. The instructions read as follows:

"Where a special contract is in full force, not rescinded or waived by the parties, no recovery can be had on the common counts.

SAMUEL INGRAM Adm'r. vs. MARGARET ASHMORE.

If the jury believe from the evidence that the contract proved is different from the contract declared on by the plaintiff, they will find for the defendant.

The plaintiff avers in the declaration that there was a promissory note sold and transferred to the defendant, made by H. W. Carter, with Sullivan as security, to be used by the defendant to pay for land which she had bought of H. W. Carter and his mother. Now, if the jury believe from the evidence, that there was not a *note* sold and transferred as averred, but a *bond* executed by H. W. Carter, and N. R. Sullivan; or if the jury believe from the evidence that the bond was to be used by the defendant to pay for land purchased from Zeigler, they will find for the defendant."

J. B. KING for plaintiff in error.

The circuit court erred in giving these instructions to the jury, they confine the consideration and verdict of the jury to the special count in the declaration alone, when the plaintiff Jackson had a full right to recover under the count stated. *Stollings vs. Sappington* 8 vol. Missouri Rep. page 118.

Ashmore's agreement is, that she will execute the note or pay the money, and actually pay a part of it, a sum acknowledged to be due, certainly authorized Jackson to recover judgment against her for the remainder, upon the count stated. See 9th vol. Mo. Rep. page. 538, case of Rutledge and Farar vs. Moore.

A special count was not necessary to entitle Jackson to recover in this case.

The court erred in not granting a new trial in this case, by setting aside the non-suit for the reason stated and set forth when moved so to do.

Judge RYLAND delivered the opinion of the court.

From the statement of the facts, above set forth, and which is corroborated by what appears on the record, in this case, as the evidence given on the trial, I am satisfied that the court below erred, in the instructions which it gave to the jury.

The contract was entirely executed on the part of the plaintiff, he had delivered the bond or note, and (it is immaterial which it was) to the defendant, it was accepted by her, it was used by her in the payment of her debt, and nothing remained to be done between the parties but the payment of the money by defendant to the plaintiff, in accordance with her promise and undertaking.

The common counts were sufficient under this state of facts: and the plaintiff ought to have been permitted to recover the balance due to him from the defendant, on these counts.

Because the court refused to set aside the non-suit, therefore, which the defendant had been compelled to take by the improper instructions of the court, its judgment is reversed—and the cause remanded for further proceedings in accordance with this opinion.

THE STATE OF MISSOURI vs. CHARLES AUSTIN.

HARVEY THOMPSON vs. NATHANIEL RICHARDSON.

ERROR TO ST. LOUIS CIRCUIT COURT.

GLOVER & CAMPBELL for defendant.

1st. The execution was paid off, and was therefore *functus officio*, and all power in the officer to act under it was spent. 3 Mon. 338. The sheriff is not entitled to receive commission on money not paid to him. See Rev. code 1835 page 269, 38. But conceding that he had, yet the power of sale, the plaintiff in error was not an innocent purchaser for valuable consideration without notice: no deed was ever made to him, and it does not appear that the purchase money was paid. Judgment paid, sale void, 15 John 443; 7 John 535; 8 Coke 96. In Woodcock vs. Bennett, the execution issued after a year and a day after the revival, and was held voidable only. 1 Cowen R. 712. In Jackson vs. Caldwell, the question was discussed, but not decided. 1 Cow. 638; 6 Men. 33, sale without authority void. 18 Johns 441, was a sale for the taxes which was paid void. 4 Dallas 214, was a case where cassa was levied, and property afterwards sold under a *fi fa* void—where the writ will justify the officer, it will pass title 9 Mis. Rep. 136, paid, party bot. void; 16 John 443.

2d. The plaintiff had power to order a return of the execution, and that disarmed the sheriff of a power of sale.

3d. No exception was taken to the opinion of the circuit court, which can be revived in this case—true there is a general objection on the record to the whole action of the court, but there is not that particularity which the practice demands. 1 Cowen 622 & 9th Mo. R. 379; Vaughn vs. Bank Mo.; Ib. 291; Ib. 305.

4th. The sheriff should have looked to the plaintiff for his commission, and in no event could he sell the defendant's land.

5th. The record in this case is imperfect in not showing what was the contents of a paper which was before the court, but is stated by the clerk to have been lost. This court cannot therefore reverse the judgment.

6th. The sale upon its face was fraudulent and oppressive on the part of the officer; and the inadequacy of the consideration shows it.

Judge NAPTON delivered the opinion of the court.

The judgment is affirmed for want of an assignment of error.

THE STATE OF MISSOURI vs. CHARLES AUSTIN.

ERROR TO ST. LOUIS CRIMINAL COURT

STATEMENT OF THE CASE.

At March term of Saint Louis criminal court, the grand jury of St. Louis county found an

THE STATE OF MISSOURI vs. CHARLES AUSTIN.

indictment against Charles Austin for a violation of the act entitled "an act to license and tax billiard tables." R. C. 1845, 170. The indictment contains two counts. The one charging that the defendant "unlawfully did keep a billiard table without a license continuing in force. The other count charges that the defendant unlawfully did permit to be used and kept a billiard table without a license continuing in force.

Afterwards, on the 25th day of May, 1848, the case came on for trial, and a general verdict of guilty was rendered by the jury which tried the case, and assessed a fine against the defendant of four hundred dollars.

The defendant filed a motion for a new trial, which motion was, on the 8th June, 1849, overruled by the court.

The defendant then filed a motion in arrest of the judgment, which was sustained by the court.

LACKLAND for the State.

The reasons contained in the motion in arrest upon which the court gave judgment for defendant, are

- 1st. That the indictment is informal, insufficient and illegal, and
- 2nd. That no offence against the laws of the State is charged in said indictment.

These two reasons amount to nothing more than that the indictment is insufficient in law.

The first count in the indictment charges that Charles Austin, at, &c., unlawfully did keep a billiard table without then and there having a license therefor continuing in force, contrary, &c.

The second count charges that said Charles Austin, at, &c., unlawfully did permit to be used and kept a billiard table, without then and there, and on said other days and times, having a license therefor continuing in force, contrary, &c.

These counts are based upon the 5th section of the act entitled on act to license and tax, billiard tables, R. C. 1845, page 170. Both of these counts are in the words of the statute: and are therefore sufficient. *State vs. Baugher*, 3 Blackf. 307; *U. States vs. Wilson*, 1 Bald. 78; *State vs. Lancaster*, 2 McLean, 431; *State vs. Duncan*, 9 Port. 260; *State vs. Mitchell*, 6 Mo. 147; *State vs. Helm*, 6 Mo. 263; *State vs. Noel*, 5 Blackf. 548; *State vs. Click*, 2 Ala. 26; *Simmons vs. State*, 12 Mo. 268.

If either of the counts contained in said indictment are sufficient to support a *general verdict of guilty*. *Harris vs. Purdy*, 1 Ste. 231; *People vs. Curling*, 1 Johns. 320; *Commonwealth vs. Bennett*, 2 Virg. cases, 235; *Turk vs. State*, 7 Ham. (part 2d) 240; *Curtis vs. People Breese*, 197; *U. States vs. Pirates*, 5 Wheat. 184; *Kane vs. People*, 3 Wend. 363; *Kirk's case*, 9 Leigh. 627; *State vs. Turner*, 2 McMullen, 399; *State vs. Davidson*, 12 Verm. 300; *State vs. Lassley*, 7 Port. 26; *Ala.*; *Friar vs. State*, 3 How. Miss. 422; *Stone vs. State*, 1 Spencer, 404; *U. S. vs. Borough*, 3 McLean, 405.

In the court below it was contended by counsel for defence, that if one keep a billiard table in his parlor for his own private use, and the use of his friends and visitors, it would be an offence if the first count in the indictment contain an offence. If one keep a billiard table for his own private use and the use of his friends, and without taking pay for games played, even in this case it is contended that it would be an offence under the statute, because the statute is general, and makes exceptions. All persons who keep billiard tables, and suffer games to be played thereon, are equally liable, and it makes no difference whether the tables be used for hire, let, or amusement.

But suppose, for the sake of argument, that one who keeps a billiard table for private use be guilty of no offence. This is an exception then which is not contained in the clause creating the offence, nor any where in the statute. And the indictment need not negative any such exception, but it is a matter available on the trial or by plea. See *State vs. Buford*, 10 Mo. 703.

R. S. CURLE & A. GODDIN vs. THE ST. LOUIS PERPETUAL INSURANCE COMPANY.

It was contended in the court below, that the second count was bad because it did not state the name of the person whom defendant permitted a billiard table. It is contended that this is no defect. The count is in the language of the statute.

Judge RYLAND delivered the opinion of the court.

This case is fully within the principle settled by this court at this term in the case of the State vs. Kesslering. Both cases were indictments under the 5th section of the act concerning "billiard tables." The points, therefore, ruled in Kesslering's case must govern this, and reference is made to the opinion of the court in that case.—(a)

The judgment of the criminal court is reversed, cause remanded, with directions to enter up judgment on the verdict found herein by the jury.

Judge NAPTON dissenting.

(a) See State vs. Baugher, 3 Blackford, 307; U. S. vs. Wilson, 1 Bald. 78; State vs. Lancaster, 2 McLean, 431; State vs. Duncan, 9 Part. 260; State vs. Mitchell, 6 Mo. 137; State vs. Helm, 6 Mo. 263; State vs. Noel, 5 Blackf. 548; State vs. Chick, 2 Ala. 26; Simmons vs. State, 12 Mo. 268.

RICHARD S. CURLE & ARCHIBALD GODDIN vs. THE ST. LOUIS PERPETUAL INSURANCE COMPANY.

Where a debtor verbally accepts a written order from his creditor, in favor of a third person, he becomes liable to the latter, for the amount of the acceptance.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.**STATEMENT OF THE CASE.**

The St. Louis perpetual insurance company obtained a judgment against Benjamin Ames, in the St. Louis court of common pleas. On this judgment an alias execution was issued, and Curle and Goddin summoned as garnishees.

R. S. CURLE & A. GODDIN vs. THE ST. LOUIS PERPETUAL INSURANCE COMPANY.

The usual interrogatories were filed at the return term, and at the same term Curle and Goddin filed their answer, in which they say, that they were indebted to John O'Fallon in the sum of three hundred and seventy-five dollars, due for rent. That said O'Fallon gave Benjamin Ames an order on them for the sum due ; that Ames presented the order, which they verbally agreed to pay; that after they were summoned as garnishees in this case, the order was returned to O'Fallon, and that he said O'Fallon then called on the respondents, and required payment of them, and they then paid to said John O'Fallon the said sum of three hundred and twenty-five dollars due for rent as aforesaid ; and that no other accounts existed between them and said Ames at the time they were summoned, &c. ; and they submit these facts for the court to pass upon, and decide as to their liability.

Upon the coming in of this answer the plaintiff moved for judgment against the defendants upon the facts stated in the answer, which motion was entertained by the court, and judgment awarded.

The appellants (here) then moved for a new trial, which was refused, to which refusal exceptions were taken and the case brought here by appeal,

McPHERSON for appellants.

It is contended for the appellants, that the court below erred in giving judgment against them upon the facts stated in the answer. The answer does not admit any indebtedness to Ames.

Ames could not have sued in his own name upon the *verbal* promise to pay. Nor was such promise binding on the appellants, as the order amounts to a bill of exchange, and if so, the acceptance must be in writing. Rev. stat. 172.

The plaintiffs below were bound to show the indebtedness of the appellants to Ames at the time they were summoned as garnishees, and it must be such an indebtedness as would entitle Ames to maintain his action against them.

Again, the order may have shown, if produced, that Ames was only the agent of O'Fallon, to collect the rent due.

And it is contended that this court have established the doctrine that the plaintiff must clearly show the indebtedness of the garnishees at the time they were summoned, which was not done in this case. Scott and Rule vs. Hill and McGunnegle Mo. Rep. 88.

GAMBLE & BATES.

1st. On the general principle of the action of assumpsit Curle and Goddin were liable. Their indebtedness to O'Fallon, and his order to pay Ames, constituted a good and valuable consideration to support their promise. Weston vs. Barker 12 John R. 276; 2 Farfield 385.

2d. The order of O'Fallon, as stated in the answer, was a simple command or request, and not a bill of exchange, and hence there was no need of a written acceptance.

3d. The answer admits that the garnishees recognised the order, and promised to pay its contents to Ames—which, whether written or verbal, is an acceptance by the general law, (Chit. on bills 174 &c. 8th Am. Ed.) and we must take the admission most strongly against him who makes it.

4th. The statement in this answer, that after the service of attachment, the order to pay was returned to O'Fallon, and the money paid to him, is of no force in favor of the garnishees ; and is objectionable in several particulars.

1st. It is impertinent to the matter in hand, and not responsive to the interrogatories.

2d. The garnishees are fixed by the service of process ; and no after act of theirs, can vary their liability.

3d. The money may have been paid to O'Fallon with a guaranty, or it may have been done by collusion with Ames, and for the purpose of hindering his creditors.

ABRAHAM OYSTER vs. SHUMATE & AMMERMAN.

Judge BIRCH delivered the opinion of the court.

The St. Louis perpetual insurance company, having an execution against Ames, garnisheed the plaintiffs in error—defendants below. In answer to the usual interrogatories, the defendants admitted, that having been indebted to O'Fallon in the sum of three hundred and seventy-five dollars, for rent, and Ames having presented an order upon them for that sum, they verbally agreed to pay it to him.

Matters stood thus until they were garnisheed, after which the order was returned to O'Fallon, upon whose requisition, and to whom, they paid the money.

If this had been "a bill of exchange" instead of "an order," whilst a written acceptance would have been necessary (under our statute) to have charged the defendants below with the liabilities which pertain to "*acceptors*," we apprehend it would have been unnecessary in an equitable proceeding like the present. Be this as it may, a verbal acceptance of such "an order," or even a verbal agreement admitted all round, whereby one man assumes to pay to a third person the debt which he owes to another, is not deemed to be within the statute of frauds, and is no less binding and conclusive upon the parties than if the whole had been in writing.

Not doubting, therefore, that the defendants were legally indebted to Ames at the time they were garnisheed, the judgment of the court of common pleas, which rightfully found them liable to the authorised proceedings of his creditors, is affirmed, with costs.

ABRAHAM OYSTER vs. SHUMATE & AMMERMAN.

1. A judgment confessed before a justice of the peace on a day not his law day, is void.
2. A judgment rendered by a justice of the peace on a confession not in writing is void.

ERROR TO LEWIS CIRCUIT COURT.

GLOVER & CAMPBELL, for plaintiff.

ABRAHAM OYSTER vs. SHUMATE & AMMERMAN.

1. The transcript of judgment filed in the circuit court was good upon its face.
2. It was not competent for the justice to testify what he did or did not do in regard to matters of which entries should be made upon his docket. If there was no written confession among the files of the case, a subpoena *duces tecum* to bring those files, would have produced them, and an inspection exhibited the only proper legal evidences of the non-existence.

ANDERSON, ELLYSON AND DRYDEN, for defendants.

1. A judgment rendered by a justice of the peace on a confession not taken in writing signed by the defendant, or some one by him thereto lawfully authorised, and filed with the justice, is void.
2d sect. of the 8th art. p. 362, Rev. Code of 1835, title justices' courts.
2. Justices' of the peace are authorised to render judgments by confession only in certain specified cases and under special limitations; and a judgment thus rendered should show on its face the existence of all the facts necessary to give the justice authority and jurisdiction, to wit: 1st, the appearance of the defendant, and 2d, the confession of defendant in writing.
3. It was competent to prove by the parol evidence of the ex-justice Johnson that the confession was not in writing, the record of the justice being silent on this point. If not, a defect like this could not be proved at all, and the result would be a judgment confessed without writing would be as valid as if confessed with it.
4. The judgment being void, all process therein must likewise be void.

Judge BIRCH delivered the opinion of the court.

On the 20th May, 1848, the defendants filed their motion in the Lewis circuit court, to quash an execution which had been issued by its clerk on a transcript from the docket of a justice of the peace.

The grounds of the motion were, first, that the judgment which was stated to be by confession, did not appear to have been taken on a day fixed by the justice for holding his court, and secondly, that it was not in writing.

The provisions of the act of 1835, under which these proceedings were conducted, are substantially retained in the code of 1845, and we think either of the causes sufficient under either law. A justice has no authority except as delegated by the statute, and which matters of form may be liberally and indulgently construed for reasons heretofore signified by this court, their authority can only be exercised in strict subordination to the terms and scope of its delegation.

The first and second sections of the first article of the "act to establish justices' courts and to regulate proceedings *therein*," give those officers authority "to hold a court for the trial" of this particular class of cases, in common with those instituted by summons, from which we are scarce left to mere inference, that the confession, although subse-

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quently authorised in general terms, was intended to be made before the justice as "a court" holden periodically, just as other judicial tribunals are.

In practice, these "courts" then conformed to the days directed to be appointed every month, now "every two months for the return of summons;" and were we at liberty to discuss the policy or the morality of the law, instead of the law itself, it might not be unworthy of consideration, whether a *wider* door for fraud should be thrown open, by permitting a justice's docket to be made the daily medium of judgments and consequent liens, in favor of preferred creditors and particular friends, to the virtual exclusion of others equally or more meritorious.

The other reason is even clearer and more conclusive. By the second section of the sixth article of the justices' law, it is enacted that "no confession shall be taken or judgment rendered thereon, unless the confession be in writing, signed by the defendant, or some person by him authorised, and filed with the justice." We do not feel called upon for a positive decision as to whether the docket of the justice, and consequently the transcript filed with the clerk, should *shew* that the confession was in writing before he would be justified in issuing an execution upon it, because, in this case, it happened to be within the power of the defendants in the execution to introduce the former justice himself, who was very properly permitted to testify, as well to the fact that the confession was merely oral, as that it was not taken on his regular court day.

For these reasons the judgment of the circuit court, which quashed the execution in question, is affirmed.

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ERROR TO ST. LOUIS COURT OF COMMON PLEAS.

Judge NAPTON delivered the opinion of the court.

This case depends upon the same question decided at the last term of this court, in the case of *Carroll vs. the city of St. Louis*.

Judgment affirmed

JANNY & MILLER vs. BANK OF MISSOURI Garnishee of WM. SMITH.

NATHANIEL E. JANNEY & ROBERT H. MILLER vs. BANK OF MISSOURI GARNISHEE OF WILLIAM SMITH.

The bank of Missouri does not become debtor to the *holder* of a United States government draft, until it is *accepted*, although she has funds of the government on deposit, properly subject to the payment of it.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

CROCKETT & BRIGGS for appellants.

1st. That the drawing of the bill of exchange in question by paymaster Walker, was pro tanto an assignment of the fund on deposit with the bank to the use the payee or any subsequent holder of the said bill; and that when the bank had notice of the drawing of said bill, and was notified that Colburn and Smith were the lawful holders of said bill, the bank thereupon became liable to Colburn and Smith, or to Smith as surviving partner for the proper application of said fund. Mandeville vs. Welch 5 Wheat. 277; Legro vs. Staples 4 Ship. R. 252; Turnan vs. Jackson 5 Peters 580 Debbesse vs. Naiper 1 McCord 106; Johnson vs. Thayer 5 Shep. R. 401; Bailey on Bills 36; Gibson vs. Cook 20 Pick. 15, Corse vs. Craig 1 Wush. C. C. R. 424; Robbins vs. Bacon 3 Greenleaf 346; Brooks vs. Hatch 6 Leeghs R. 534.

2d. That the bank, after notice of the draft, was bound to apply the funds on deposit, to its liquidation. If she had failed, or refused so to apply them, she would have been liable to Colburn and Smith, even without an acceptance, in an action at law for a misapplication of the funds; and if so liable, then she had effects in her hands when she was summoned, which may be reached by garnisheemont

3d. That if the bank would not have been liable to Smith as surviving partner, in an action at law, without acceptance for a misapplication of the fund, she was without doubt liable in a court of equity, and could have been compelled to apply the fund in payment of the bill. If at the time the garnishee was summoned, Smith could have enforced this equitable right, then under the statute regulating garnisheements in cases of attachment, his interest in the fund was liable to attachment, and the garnishee may be compelled in this form of proceeding so to apply the fund.

4th. That the rule established in the case of Mandeville vs. Welch 5 Wheat. 277, that a bill of exchange drawn upon a particular fund, operates as an assignment only when it is drawn for the whole fund—does not apply to drafts upon banks of deposite, which from their very nature, and from the unvariable course of business and established usage are bound to pay drafts upon funds deposited in any amounts that the depositor chooses to draw for; consequently, a draft for a part of the amount deposited, operates as an assignment pro tanto.

5th. The bank was liable to Colburn and Smith even without acceptance, because her conduct on being notified by Lewis of the existence of the draft, was equivalent to a pledge that the bill should be paid when presented by the lawful holder; and Smith being the lawful holder, the bank was liable to him for the amount of the bill.

Bailey on bills 393, 394, 395; Yates vs. Bell 3 Barn. & Ald. 643; Stewart vs. Frye 7 Taunt. 530.

6th. That an obligation to accept the bill was fairly to be implied from the custom of trade, and the course of business between the bank and the government. If so, the bill operated as an assignment pro tanto.

Manderville vs. Welch 5 Wheat. 277.

7th. That if Smith's interest in the fund could have been enforced only in equity as between him and the bank, it was nevertheless such an interest as can be garnisheed. The statute regula-

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ing attachments contemplates, that all demands due from the garnishee to the defendant, shall be held for the debt. Sec. 12 requires the officer to declare to the garnishee "that he attaches in his hands *all debts* due from him to the defendant." Sec. 13 provides that all persons shall be summoned as garnissees who shall be found in possession of goods, *money or effects* of the defendant, and *also such as the plaintiff or his attorney* shall direct.

Sec. 27 provides that the plaintiff may exhibit allegations and interrogatories, touching the *property, effects and credits* attached, and require such garnishee to make full, direct and true answers on oath. Sec. 25 provides that if it shall appear that the garnishee is possessed of property or effects of defendant, or is *indebted to defendant*, the value of the property and effects, or of the debt, shall be ascertained, and judgment rendered for the amount. In none of these sections, nor in any other, is there a distinction made between legal and equitable demands: *all credits, effects and debts*, of whatsoever nature, may be attached: the whole proceeding partakes more of an *equitable* than a legal remedy. If, therefore, Smith had an equitable lien upon the fund in the hands of the bank, it could be reached by garnisheement.

BAY for appellee.

1st. Although the drawing of a bill of exchange for a valuable consideration is, in theory, as between the drawer and the payee a contract by which the former sells or assigns to the latter funds in the hands of the drawee to the amount of the bill, yet this implied contract creates no privity between the payee and the drawee, whose contract commences with and arises out of the acceptance. Story on bills of ex. sec. 13, 113, 114, 115, 116, 117, 118, 238, note 1, 287; Chitty on bills p. 280, 281; 10th Am. Ed.

2d. The refusal of the drawee to accept, give no right of action to the payee against the drawee, because there is no privity of contract between them (ib.) Even a promise by the drawee to the drawer to accept, and a subsequent refusal, would give no right of action to the payee against the drawer, for the same reason; besides, a promise to accept is a mere chose in action on which the promise only can maintain an action. Worcester Bank vs. Wells et al. 8 McCalp 107; Johnson vs. Collins 1 East. 104.

3d. The bona fide holder of a bill of exchange takes the bill free of all equities between antecedent parties of which he had no notice. Story on bills of ex. Sect 14, 15, 187, 188, 189; Story on promissory notes sect. 175—notes. At the time Smith endorsed the bill to the clerk of Powell, Wilson & Co., he was indebted to that firm, and the bill was taken in payment of such indebtedness, without notice of any equities between antecedent parties. They were therefore bona fide holders, and entitled to demand payment.

4th. The doctrine that courts of law will recognize and protect the equitable rights of an assignee of a chose in action, is not applicable to bills of exchange and other negotiable instruments, and is also confined to cases where the *entire* chose in action has been assigned.

Manderville vs. Welch 5 Wheat. 277.

5th. The principle advanced by the appellant, that the drawing of a bill of exchange is an assignment of the amount for which it was *drawn* to the payee, so as to create a privity between him and the drawee, is contrary to all the rules applicable to such instruments, and is negatived by some of the very authorities cited by the appellant.

Manderville vs. Welch 5 Wheat. 277; St. John vs. Homans 8 Mo. R. 385, 386.

Judge NAPTON delivered the opinion of the court.

It was settled at an early day in this State, that debts due by negotiable paper could be subject to the process of attachment, and this

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has been regarded as the law ever since. The inconvenience of this doctrine, especially in the absence of any legislative provision by which the holders of the paper subsequent to the title of the defendant in the suit can be brought into the litigation, is sufficiently obvious, and was adverted to in some of the latter cases.

In Hill and McGunnegle vs. Scott and Rule, it was determined, that the plaintiff must show affirmatively, that the bill was not transferred by the defendant previous to the service upon the garnishee, but it was not decided what effect a transfer subsequent to the attachment would have upon the proceeding.

It seems, however, to have been the opinion of one of the judges, perhaps of all, that such a subsequent transfer would not affect the liability of the garnishee, and that the only course left to the subsequent endorsee would be, either to interplead, or, if ignorant of the proceedings, to bring his action for money had and received against the plaintiff in the attachment.

The question upon which the present case turns is evidently new. In none of the cases heretofore before the court, was there any instance of the creditor attaching the drawee of a bill of exchange before acceptance. In the settlement of this question, we are left to the general principles of the law merchant, modified only by our statutes which give this process of attachment.

A bill of exchange is an order upon the drawee, to pay a certain sum of money to the holder. Before the drawee accepts the bill, he is a stranger to the contract, and is not liable, (unless under particular circumstances) to any of the parties. If he has funds of the drawer in his hands, or has otherwise bound himself to meet the drafts, he is liable to the drawer for failing to accept. The drawer may sue him for re-exchange and damages, but there is no privity between him and the payee or holder. The latter can maintain no action against the drawee. Chitty. Story.

But it is said, and no doubt correctly, that a bill of exchange, when the drawee has funds of the drawer in his hands is a transfer by the drawer of this fund to the payee ; that this transfer creates in the payee, if not a legal, at least an equitable interest in this fund ; and that courts of law and equity will protect the interests of this payee in the chose in action thus created. It is said that when the drawee is notified of the rights of the holder, he becomes liable, in some shape, to such holder, if his assent to consider himself so liable may be fairly inferred from the previous dealings of the parties. To this doctrine I see no objection.

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It was first intimated, with certain qualifications, in *Manderville vs. Welch*, (5 Wheat.) and has since been acted upon in various cases cited by the counsel.

None of the cases, however, relate to the acceptance of negotiable paper. They are cases of transfers of book accounts, promissory notes, or some other kind of property, where the assignee of the fund or property gives notice of his interest, and the possessor expressly or impliedly assents to the transfer, and assumes expressly or impliedly a liability to the assignee. All the cases cited admit that there must be an assent, express or implied. But where is the implication of assent under the facts in the present case? The bank had not accepted the draft, when she was garnisheed. She had by her previous course of dealing in relation to these drafts, impliedly agreed to accept all drafts of the kind—but when, and for whose benefit? Certainly when properly presented, and for the benefit of the holders at the time of presentment. At the time she was garnisheed, she was not the debtor of Colburn and Smith. She was apprised that they were the holders of a government draft, which she was bound to accept when presented—but she was bound to accept in favor of the holder who presented it. This is all the implication that the previous dealings of the parties was calculated to create—in fact, the conduct of the bank, at the time the bill was presented by Lewis, was an obvious indication of intention to pay the bill to the *holders at the time of presentment*. The bill was payable at sight. Some of the consequences of holding the bank a debtor to all holders of drafts never presented or accepted, may not be unworthy of consideration. The United States, it would seem from the testimony, has occasion to keep large amounts of funds in this bank, by what authority I shall not stop to inquire. Her officers or agents are authorised to draw upon this fund to meet her liabilities at various places, and to various persons. If the creditors of these holders of government drafts can arrest this fund in the vaults of the bank, before she has accepted the drafts, the inconveniences to the bank might be readily foreseen. Her ordinary business might be suspended, and her officers chiefly employed in making out answers to attachments like the present, and in defending herself in a scramble between debtors and creditors with whom she has no concern. Her capacity for the commercial purposes, which it is presumed her charter was intended to subserve, would be paralized.

It is conceded that the bank may be garnisheed, but can she be considered as the debtor of all persons holding drafts on her, unaccepted?

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it will be recollect also, that this was a draft drawn by a paymaster of the U. States in his official capacity. A creditor of the goverment could not attach this debt, and can creditors of her assignee attach it?

Judge Ryland concurring, the judgment is affirmed.

Judge BIRCH dissenting.

Janny & Co. sued the surviving partner of Colburn and Smith, and garnisheed the bank. It was proven upon the trial below, that prior to, and at the period of the garnisheement, Colburn and Smith were the legal holders and owners of a government bill of exchange for three thousand dollars, regularly drawn upon the bank, which had government funds to meet it, and that it was the universal usage or course of business in the bank to pay all such bills when properly presented. In this case, it rightfully enough refused to *pay* the one in question, when presented by a person into whose hands it had fallen after the murder of Colburn, because it was not properly endorsed to him. The bank, however, made and retained a memorandum of the draft, and before any other disposition was made of it, the plaintiffs below, (appellants here) commenced their suit against Smith, and summoned the bank as garnishee.

It is deemed unnecessary to look further after the bill than to add, in justice to the bank, that it promptly paid the whole of it, when subsequently endorsed by Smith, after his return from Santa Fe, instead of retaining, as it might have done, a sum sufficient to cover the contingent liability to which it had been intermediately subjected.

I have met with no adjudications *exactly* in point, and the case is one upon which, estimated in all its bearings, the wisest and most reflecting may readily disagree. I am of opinion, however, that the limitation of the principle of assignment, which is relied upon as in the case of Manderville vs. Welch, 5 Wheat 277, is inapplicable, and should not be entertained under circumstances like the present. Although not informed of the precise nature of the contract which existed between the government and the bank, the custom which is testified to is so accordant with the fitness of things, as to warrant the conclusion that it had bound itself to accept and pay all such demands when properly presented. In the very language of the court in the case alluded to, this is deemed to have been a case in which "an obligation to accept may be fairly implied from the course of trade, or the course of business between the parties, as a part of their contract." It is at all events

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too absurd for supposition that it had the legal option of paying or refusing a draft which did not come up to the exact amount from time to time deposited. Such an option would have been not only inconsistent with the object of disbursing to the creditors of the government the funds it deposited, but its distant paymasters could *never* have drawn a valid bill, because never knowing the precise sum embraced in it. The bank, then, not having the just or moral *option* alluded to, the mere "non-acceptance" of the bill in question, although exempting it from the special liabilities of "acceptor," in no respect changed its liability for an ultimate proper application of the money which it thereby had notice was assigned, or set over, to Colburn and Smith.

Looking at it in this light, I cannot doubt the right of either of their creditors, *eo instanti*, or at any time before its legal transfer to another, to pursue such a fund by the usual process of attachment, nor that it was the duty of the bank, after it was garnisheed, to have held enough of it to answer the ultimate judgment of the court, which I think should have been in favor of the plaintiffs. Whatever legal or equitable interest Smith had in the fund was properly open to his creditors; and the plaintiff having relied upon the open legal diligence, upon which our jurisprudence looks with deserved and deserving favor, he bank should have disregarded any subsequent *private* arrangement which was entered into, however apparently "regular upon its face," which was incompatible with the intervening rights acquired by virtue of the garnisheement.

In reaching this conclusion, I have not been unmindful of what has been said in reference to the commercial character of such instruments, and the consequent right and consequent risks of those who subsequently purchase them without notice of the intermediate proceedings alluded to. No such question properly arises in this case—the subsequent endorsee having taken the bill merely for collection and disbursement—but were it otherwise, I am inclined to the opinion that the safest and soundest rule for the due protection of *all* parties, whether conventional or legal, is the one intimated in this dissent.

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APPEAL FROM ST. LOUIS COURT COMMON PLEAS.

STATEMENT OF THE CASE.

The appellant, Franklin, commenced his suit by attachment against Smith in the court below, as surviving partner of Colburn and Smith, and caused the bank to be summoned as garnishee. The cause progressed against Smith, the defendant, in the original suit, against whom judgment was finally rendered for \$2842 78. In proper time the plaintiff filed allegations and interrogatories against the bank as garnishee in the usual form, and alleged as the ground on which the garnishee was required to answer: that when said garnishee was summoned, the defendant Smith, as surviving partner of the firm of Colburn & Smith, was the lawful holder and owner, as said garnishee well knew and was advised of, a check or draft upon said bank for \$3000, drawn by some paymaster in the army of the United States, in favor of said firm of Colburn & Smith, and to meet which draft, funds had been provided by the government, and were then on deposit with said bank to be applied to the payment of said draft; and further that Smith, surviving partner as aforesaid, was as the said garnishee, very well knew the lawful owner of and entitled to the possession of sundry checks upon the said bank, drawn by paymasters in the army of the United States, at Santa Fe, amounting in the whole to the sum of about \$2390, most of which were payable to bearer, and those not so payable, were endorsed in blank by the respective payees, which checks belonged to the firm of Colburn & Smith at the time of the death of said Colburn, and when the said garnishee was summoned, the said checks belonged to and were the lawful property of the said Smith, survivor as aforesaid, as the said bank well knew at the time when said garnishee was summoned. The government had on deposit with said bank, applicable to said checks, funds and money sufficient to pay the same, and has ever since had and now has. The bank, in her answer, puts in a general denial to the interrogatories, but is entirely silent as to the special grounds alleged by the plaintiff for causing her to be summoned as garnishee. The plaintiff filed a general traverse of the answer, and the cause was submitted to the court sitting as a jury. The court found the issue in favor of the garnishee; whereupon the plaintiff, within the proper time, filed a motion and the usual reasons for a new trial, which was overruled by the court, and the plaintiff excepted and appealed to this court. The bill of exceptions shows that the plaintiff introduced proof tending to show that prior to the time when the garnishee was summoned, the firm of Colburn and Smith, residing at Santa Fe, were the lawful holders and owners of a bill of exchange for \$3000, dated 31st December, 1846, drawn by Maj. Walker, a paymaster in the army of the United States, in his official capacity, upon the said bank, payable at sight, to the order of Maj. Spalding, by him endorsed to Lieut. Garnier, and by the latter to Colburn & Smith. That Colburn, one of said firm, in coming from Santa Fe to St. Louis in the spring of 1847, was murdered on the plains, having before his death dispatched a messenger with his money and effects, and amongst others the bill in question, to Independence in this State. That on the arrival of the messenger at Independence, he placed the effects in the hands of John Lewis, of Independence, who claiming that Colburn & Smith were largely indebted to him, went to St. Louis, the place of business of the bank, taking with him the bill of exchange in question, which he presented to the cashier of the bank, as also to the president and directors, and demanded payment of said draft, which was refused on the ground that it was not endorsed by Colburn & Smith, and therefore they had no authority to pay it to Lewis. It was also proved that the bank then had on deposit funds of the

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government of the United States, subject to draft, to cover this bill, and that when Lewis presented the bill, the bank officers took a memorandum of it. That Maj. Walker, the drawer of the bill, had authority to draw it, and payment to Lewis was not refused because there were no funds to meet it to the credit of the government, but only for the reason that the bank did not consider that Lewis had authority to receive the money. It was also proved by the cashier of the bank that it has always been the custom of the bank to pay government drafts, whether the government had funds on deposit to meet them or not; that payment had never been refused of a government draft, because of a want of funds deposited to meet it, but that when the bill in question was presented for payment by Lewis, there was in point of fact on deposit with the bank, funds belonging to the government, subject to the draft of its disbursing officers, sufficient to cover this draft. Evidence was also given tending to prove that when the bank refused payment to Lewis, he took the draft back with him to Independence, and retained it in his possession until said garnishee was summoned. That the defendant Smith, who was surviving partner of Colburn & Smith, was at Santa Fe, New Mexico, his place of residence, whilst these transactions took place; that he left Santa Fe for St. Louis, Mo., on the 4th or 5th of July, 1847; that on his arrival at Independence, *after the garnishee was commenced*, Smith settled with Lewis, and obtained from him the draft in question, which he brought with him to St. Louis. That the firm of Colburn & Smith being indebted to the late firm of Powell & Wilson, Smith on his arrival at St. Louis, about the middle of August, 1847, endorsed the bill as surviving partner of Colburn & Smith, to George DeBarm, the clerk of Powell & Wilson, who had no interest therein, but took it only for collection; that on the same day DeBarm presented the bill, thus endorsed, at the bank for payment, and it was then paid to him; that Smith when he endorsed it, handed the bill to Wilson, of the firm of Powell & Wilson, and directed him to receive the proceeds, and out of it to retain certain debts due from Colburn & Smith to Powell & Wilson, and to pay the remainder to Jeffries and other creditors of Colburn & Smith, which was done. This was all the evidence in the cause.

The plaintiff then moved the court to declare the law of the case to be as follows:

1st. That if before the garnishee was summoned in this cause, there was deposited with said garnishee by Maj. Walker, a paymaster of the United States army, money belonging to the government of the United States, subject to his check as paymaster aforesaid, and which by agreement, or by the usual course of dealing between the garnishee and said paymasters, was to be checked out by said paymaster in such sums as he might see fit from time to time, and if said paymaster before said garnishee was summoned, drew his check or draft upon said garnishee for three thousand dollars, which by regular endorsement of the payee was transferred and delivered to Colburn & Smith, of which firm the defendant Smith was a partner, and if Colburn departed this life leaving the defendant Smith his only surviving partner of said firm, and if after Colburn's death, and before said garnishee was summoned, and whilst said check or draft was held by said Smith as surviving partner as aforesaid, under the endorsements aforesaid, and whilst there was enough of said fund remaining on deposit as aforesaid, with said garnishee to pay and satisfy said draft, the said check or draft was presented at said bank to its cashier, and he saw and examined the same, and was informed that the same belonged to and was the property of said defendant Smith, as surviving partner as aforesaid, and if the said cashier then and there refused payment thereof only on the ground that said check was not then endorsed by said Colburn & Smith, or by said Smith as surviving partner; and if the said garnishee was summoned before the said Smith had endorsed or transferred the said check, and whilst the same was the property of said Smith as surviving partner as aforesaid, then the plaintiff is entitled to recover.

2nd. That the drawing of the check by Maj. Walker upon funds then on deposit, to his credit with the garnishee, was in contemplation of law an assignment of so much of said fund to the payee, or any subsequent endorsee of said check under the facts as proved, and when the garnishee was notified of said check, and that the same was regularly endorsed to, and

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was the property of said defendant as surviving partner, the said assignment became completed and the defendant Smith thereby acquired an equitable lien on said fund to the amount of said check, and if whilst said equitable lien existed, and whilst said check was still the property of said defendant Smith, and whilst the fund remained in the hands of the garnishee, the said garnishee was summoned in this action, then the plaintiff is entitled to recover.

3d. That if from the custom of trade or the course of dealing between the garnishee and Maj. Walker, and other disbursing agents of the government of the United States, it was usual and customary for the garnishee to honor all checks and drafts drawn by said disbursing agents for whatever amounts, and whether funds had been provided by the government to meet the same or not, then an obligation on the part of said garnishee to accept drafts drawn by said agents on said garnishee may be fairly implied as a part of their contract. All of which instructions were refused by the court and exceptions taken by the plaintiff. The court at the instance of the garnishee, then declared the law to be as follows:

1st. The garnishee moves the court to instruct the jury that from the evidence the said plaintiff has no right of action in this proceeding against said garnishee.

2d. That the refusal of the bank to pay said check gives no right of action against the bank in favor of the holder or owner of said check, unless the bank accepted the same in favor of said holder or owner.

3d. That the mere refusal of the bank to pay said checks, or the payment of said checks to a person not authorized to receive the money, does not make the bank the debtor of the holder or owner of said checks.

4th. That the mere refusal of the bank to pay a check to the owner or holder thereof, even though the bank may have at the time sufficient funds of the drawer of said check to pay the same, gives no right of action against the bank in favor of the holder or owner of said check.

5th. The drawer of a check or draft is not liable to any action on the part of the payee for refusing to pay or honor such check or draft, unless the drawee has accepted the same or agreed to accept the same.

To all which the plaintiff objected and excepted at the time. The court having rendered judgment for the garnishee, and refused to grant a new trial to the plaintiff, he has brought the case to this court by appeal, and assigns for error,

1st. The refusal of the court to grant him a new trial. 2d. The refusal of the plaintiff's instructions. 3d. The giving of the garnishee's instructions. 4th. That the verdict and judgment ought to have been for the plaintiff.

S. M. BAY, for appellee.

1. The drawing of a check on a bank is not an assignment of the amount for which it was drawn to the bearer. 1st. John. vs. Homans, 8 Mo. R. 386; Mandeville vs. Welch, 5 Weston, 286. The doctrine that counts of law will take notice of and protect equitable assignees of choses in action, is not applicable to instruments of this class which are governed by the law applicable to bills of exchange.

2. There is no privity of contract between the holder of a bill or check and the drawer, until acceptance or a promise to pay or accept. There is, it is true, an implied contract between the drawer and the drawee, and also between the drawer and the holder. But it is presumed the holder could not avail himself of these implied contracts, as against the drawee, except under peculiar circumstances, and then only through the medium of a court of equity. Story on Bills of Ex., sect. 338, and note to same, sect. do. sect. 13, do. sect. 489.

3. The check was endorsed by Smith, and negotiated to the person who received the money after the bank was garnisheed. If this transfer was valid, the bank was bound to pay the

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check to the holder. To hold the transfer invalid would be repugnant to the law governing instruments of this class, and would in effect destroy their negotiable quality.

4. There is no positive evidence that the drawer of the check had in bank, at the time the check was drawn, or at any subsequent period, funds placed there to meet the check. The fact that the bank, as a matter of courtesy, honored the drafts of public officers, whether they had funds in the bank or not, could not impose any legal obligation on her to pay the check.

Judge NAPTON delivered the opinion of the court.

This case involves the same question determined in *Janny & Wilson vs. The Bank of Missouri.*

Judgment affirmed.

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1. If a person, indicted for an offence, and imprisoned, be not tried before the end of the second term after the lapse of the term at which the indictment is found, he is entitled to a discharge.
2. The confession of a defendant, not made in open court, or on examination before a committing court, but to an individual, uncorroborated by circumstances, and without proof *aliunde* that a crime has been committed, will not justify a conviction.

APPEAL FROM ST. LOUIS CRIMINAL COURT

JAMES C. JONES for appellant.

1st. The indictment under which the appellant was tried and convicted, had by virtue of the operation of the statute lost its legal force and vitality, in consequence of the State having continued his case two terms after the indictment was found, during all of which time the State had time to try him upon such indictment; and that the appellant was at all times ready and willing to be tried. Sec. 25 article 6 under practice and proceedings in criminal cases.

2d. The criminal court cannot pass judgment upon the appellant, because there was at the time the appellant had a mistrial, a good and formal motion pending, undisposed of for his discharge.

3d. The criminal court cannot pass judgment upon the appellant, because the jury did not specify in their verdict that they found the appellant guilty in manner and form as charged in the indictment.

4th. The criminal court cannot pass judgment upon the appellant, because the jury did not specify in their verdict of what offence they found the appellant guilty. Sec. 1 of art. 7 regulating practice and proceedings in criminal cases; 883 Mo. statutes; the State vs. Shoemaker 7 Mo. Rep. 180; McGee vs. the State 8 Mo. Rep. 495.

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5th. That the confessions of a person uncorroborated by other circumstances of guilt, are no sufficient to convict the person making them. People vs. Hennessey 15 Wendell 147; People vs. Badgely 16 Wendell 53; State vs. Long 1 Haywood N. C. Rep. 456; State vs. Fields Pick's. Reps. 140; State vs. Gardiner Wright's Rep. 392; Wharton's American criminal law 183, and Greenleaf's evi. vol. I, 324.

6th. That the confessions of a person are not sufficient to convict him, unless there is proof *aliunde* that a crime has been committed, whether his confessions are corroborated or not. *Ibid.*

7th. That the confessions of a prisoner cannot be received as evidence against him, unless it has first been shown that they were made voluntarily.

8th. That it is the province of the State, and not of the accused, to show that his confessions was voluntary, and since the State failed to show this, the court should have instructed the jury as asked for by defendant.

9th. That upon the evidence adduced in this cause, the appellant should not have been convicted, for the evidence does not sustain the material allegations in the indictment.

10th. That the instructions given by the court were not in accordance with the practice of courts of criminal jurisdiction, and were also against the law.

11th. That the instructions offered by the appellant and rejected by the criminal court, were law, and of vital importance to the appellant.

LACKLAND for the State.

The court did not err in refusing to sustain the motion to discharge.

The court did not err in the instructions given—said instructions contain correct law, and applicable to this case.

The court did not err in refusing the instructions asked by the defendant, because the law contained in said instructions is either embraced in instructions given by the court, or mere abstract law not applicable to this case. Abstract questions of law ought not to be given. Drury & Wiseman vs. White 10 Mo. 354.

Although the evidence, as contained in the bill of exceptions, be insufficient to prove that the defendant stole the money as charged in the indictment on the steamer Marshall Ney, yet they had a right to find the defendant guilty of simple larceny in default of sufficient evidence of the compound larceny. Archibald's crim. pleadings 5 American from the 10th London edition p. 288.

If the court erred in giving the instruction in relation to stealing from the steamer Marshall Ney, this is not an error to the prejudice of the defendant. The jury having found according to the evidence and the law governing the case. In the matter of Pratte and Labaume 12 Mo. 194.

The 5th and 6th assignments of error set forth no sufficient ground to authorize the criminal court to arrest its judgment.

The instructions offered by defendant going to the admissibility of the confessions were properly refused, because it was a question to be tried by the court. Hector vs. State 2 Mo. 135; Wharton's Or. p. 188.

It is no objection that confession was elicited by questions if no undue influence be used Wharton 187 and authorities there cited.

Judge RYLAND delivered the opinion of the court.

The defendant Robinson was indicted at the September term of the criminal court for St. Louis county, in the year 1848, for grand larceny, stealing money from one John Donnelly, from on board the boat and

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vessel called "Marshal Ney" in said county. On the 22d September, at the same term in which the indictment was found, the defendant was brought into court, and plead not guilty to the indictment—and on the 17th day of October, being the same term, the case was continued until the next term. On the 6th of December, in the November-term of said court, the case was again continued: both of these continuances appear to have been on the part of the State. The first continuance was at the term in which the indictment was found: the second continuance was at the first regular term of the court which commenced at the end of the term at which the indictment was found.

On the 7th of February, 1849, the defendant filed his motion for a discharge, which motion is as follows, (viz.:)

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William Robinson. }

And now comes the said defendant, and moves the court to discharge him from further prosecution and imprisonment in this cause, for the following reasons: 1st. Because he has been imprisoned since the finding of this indictment at September term of this court, without being brought to trial, in the time prescribed by law. 2d. Because the State has continued this cause for two terms without any good or legal cause therefor. 3d. Because this defendant has always been ready for trial, and the state has continually laid over said trial from term to term, and from day to day at this term, without good or legal cause. 4th. Because the indictment against the defendant has lost its legal effect by not being prosecuted according to law.

C. C. SUMMONS,

Att'y. for defendant.

This motion was overruled at the January term 1849 of said criminal court; and was not disposed of for some time—after it was filed. On Saturday, 24th of February, being still the January term of the court, a trial was had: but the jury not agreeing, one of the jurors, by the consent of the defendant and the circuit attorney, was withdrawn—the jury were discharged. The cause was continued until next term, and the prisoner was remanded to jail. And on the 27th February, being the same term, the above motion was overruled.

At the next term of said court a trial was had; and the defendant was found guilty, and sentenced to two years imprisonment in the penitentiary of the State. The indictment was found at September term. The State continued the case at the September term—also at the November term. At the January term, 1849, the motion was made to

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discharge the prisoner: before it was decided by the court, the prisoner was tried, and the jury not agreeing, were discharged from rendering a verdict, and the prisoner was remanded to jail; and the motion to discharge was during the same term overruled.

The motion of the prisoner for his discharge, is based upon the 25th section of the 6th article "practice and proceedings in criminal cases," which is in the following words, viz: "If any person indicted for an offence, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offence, which shall be held after such indictment found, he shall be entitled to be discharged, so far as relates to the offence for which he was committed, unless the delay shall happen on the application of the prisoner, or shall be occasioned by the want of time to try the cause at such second term."

The St. Louis criminal court holds six terms annually, commencing on the first Mondays in January, March, May, July, September, and November.

It is the opinion of a majority of the judges of this court, that the proper construction of the 25th section above recited is, that the prisoner must be tried before the end of the second term of the court, which shall commence after the lapse of the term at which the indictment was found: That is, the term at which the indictment is found is not included. Two terms after the indictment found shall commence; and if the prisoner is not tried on or before the end of the second term which shall be held after the indictment found, then he is entitled to his discharge—unless there be want of time, &c. I think, therefore, that there is nothing wrong in the court below refusing to sustain the motion to discharge the prisoner.

There is no error, therefore, in refusing to arrest the judgment. I have thought proper thus to settle this question, although the present case might have been disposed of by this court without taking any notice of this point; but we shall be again called upon if we now pass it by; therefore, this point is now ruled for the State.

The motion for a new trial, which comes first in order, will not be taken up. In order properly to understand this case, I will here repeat the evidence. There was but one witness, Thomas Woodward, who testified as follows: "I arrested the defendant some time last fall, before the indictment was found; I arrested him on a charge of stealing some nineteen dollars in silver from one John Donnelly. Donnelly pointed out the defendant to me. I arrested him, defendant, on steamer Do-

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main, which was lying at the wharf, about two blocks above the Cala-boose. When I arrested Robinson, I told him that I arrested him on a charge of stealing money from Donnelly. He replied Donnelly was a d—n fool—Donnelly was present. I took the defendant to the Cala-boose—Donnelly was in company. After we had arrived at the Cala-boose, I told defendant that Donnelly could not afford to lose the money, he worked too hard for it. Defendant put his hand in his pocket and drew out nine dollars and twenty-five cents, and threw it on the desk : there were two or three Spanish dollars, and some half dollars and other small change, amounting in all to the above sum : at the same time defendant said that Donnelly might take that. I replied that it did not belong to Donnelly, he should not take it. He said it was a part and parcel of Donnelly's money. I asked him if it was a part and parcel of the money he had stolen from Donnelly the night before. Defendant answered that it was. I took charge of the money till the next morning, when I gave it up to Donnelly : Donnelly was with us all the time, from the time of the arrest until the defendant drew out the money. The Marshal Ney was then in the port of St. Louis : I saw her that day on which the arrest was made : I think they were loading at the Marshal Ney. From the fact the steamer Marshall Ney being loaded, I concluded that she had been in port two or three days. I have seen also boats come into port without having any load." This was all the evidence given on the part of the State, and there was none on the defendant's part. The defendant's counsel asked the court for several instructions, many of which being mere abstract questions of law, this court will not notice. There was, however, one instruction asked for and refused by the court, which has a most important bearing on this and all similar cases. It is as follows : "Extra judicial confessions, or those which are made out of court, are not sufficient to convict those who make them, unless they are corroborated by other evidence, and the crime be proven to have been committed by other testimony."

In this case, there is no proof of the *corpus delicti*, other than the confessions of the defendant. Where was Donnelly, whose money was charged to have been stolen ? His absence is not accounted for, and surely he knew best whether the money was stolen from him or not. Is there any proof when, or how much money was stolen from him ? Any proof about it being stolen from on board the Marshal Ney ? In the case of the people vs. Hennessey, 15 Wendell 147, Savage, chief justice, says it will be found, I think, that however broadly judges and elementary writers have laid down the rule, yet most, if not all the reported

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cases show that very few convictions have taken place without some evidence that a crime has been committed, independent of the confession of the accused. In the same case, the same judge says: "The truth is, no court will ever rely upon the confession alone, when it is apparent that there is evidence *aliunde* to prove that an offence has been committed." From this case, then, we may safely say, (and in it I find most of the English cases reviewed) that the confessions of a party not made in open court, or on examination before a magistrate, but to an individual, uncorroborated by circumstances, and without proof *aliunde* that a crime has been committed, will not justify a conviction. Greenleaf in his treatise on evidence vol. 1 sec. 217, says: "In the United States, the prisoner's confession, when the *corpus delecti* is not otherwise proved, has been held insufficient for his conviction; and this opinion certainly best accords with the humanity of the criminal code; and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases; and it seems countenanced by approved writers on this branch of the law. It is said, that full proof of the body of the crime, the *corpus delecti*, independently of the confession, is not required by any of the cases; and in many of them slight circumstances corroborating the facts were held sufficient.

In the case of the State vs. Bromfield Long, 1st Haywood's N. Carolina Reports page 524, we find the doctrine here contended for thus declared: "Indictment for horse stealing, upon which the evidence was, that the horse was missing, and about three days afterwards, two men came with the horse and Long, tied, to the house of the owner. Long confessed to the owner he had taken the horse, and begged forgiveness. The two men who brought him were not present at the trial, and there was no other circumstance proved in the case." The court decided. When A makes a confession, and relates circumstances which are proved to have actually existed, as related in the confession, that may be evidence sufficient for a jury to proceed upon to convict the prisoner; but a naked confession, unattended with circumstances, is not sufficient. A confession, from the very nature of the thing, is a very doubtful species of evidence, and to be received with great caution. As there are no confirmatory circumstances in the present case, it is better to acquit the prisoner; the jury found him not guilty. Wharton in his treatise on "American criminal law," page 183, says: "In this country, in particular, there is a growing unwillingness to convictions on confessions alone. The confessions of a party, it has been held in

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several states, not made in open court, or on examination before a magistrate, but to an individual uncorroborated by circumstances, and without proof *aliunde*, that a crime has been committed, will not justify a conviction." He further states, that in New Jersey a different doctrine is held, and it was there considered, in a late and important case, that the confession of a boy of twelve years, afterwards retracted, and corroborated only in unassented points, was enough to convict him of murder. He was executed accordingly: but the case stands alone in its character and result. State vs. Guild. 5 Halstead 165.

Wells, in his treatise on circumstantial evidence, sec. 6 page 88, 39 vol. law library, says: "But it may be doubted whether justice and policy ever sanction conviction, where there is no other proof of the *corpus delecti*, than the uncorroborated confession of the party."

We therefore, without inserting other authorities here, which we find abundant, are inclined to support the doctrine, that the naked confessions of the prisoner, uncorroborated by other circumstances, will not justify a conviction; that the *corpus delecti* must be proved by evidence other than such extra judicial confessions.

We therefore reverse the judgment of the criminal court, and remand the case for further proceedings not inconsistent with this opinion.

JAMES V. MILAN, ADM'R. OF A. CROCKETT, DEC'D., TO USE OF:
THE EST. OF WM. R. CROCKETT, DEC'D., VS. RICARD PEMBERTON, EX'R. OF JANE WILCOX.

1. What a court of record does is known alone by its record; its doings and proceedings cannot be established by parol testimony.
2. A waiver of notice of a claim against an estate, made in open court, and noted upon the record, or upon the claim, is such evidence of an exhibiting of the claim as will take it out of the statute of limitations.
3. The statute of limitations runs against executors and administrators.

ERROR TO MARION CIRCUIT COURT,

GLOVER & CAMPBELL for plaintiff.

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1. The presentation of the demand to Pemberton, Ex'r. of Wilcox, in July, 1845, was a legal exhibition of the demand in the meaning of the statute. 4th and 5th sect. of 4th art. of administration law of 1845. See also 14th sect. same article.
2. This note, though executed to Anthony Crockett as payee, was nevertheless the property of William R. Crockett if he advanced the money upon it and received it as security therefor, and an action will lay upon it to the use of Wm. R. Crockett. 17 Johnson, 176, 4 Cowen, 572; 9 Mo. R. 227; Ib. 262.
3. No person, save Anthony Crockett, could institute a suit on said note, so long as he lived; and after his death no one but his personal representative could sue: the limitation of three years, therefore, could not commence till letters granted on his estate. See '8 Mo. R. 169.
4. The general statutory bar of ten years is not applicable to the case, because of the repeated acknowledgments of Wilcox in her life and her distributees after death.
5. An administrator is not bound by limitation.

PRATT, for defendant.

The defendant relies upon the statute of limitations. That this appears by all the circumstances to have been a State claim. That not being presented, it is barred by law in three years.

Defendant insists that the decision of the court permitting proof of the proceedings of a court of record was erroneous. That the only proof of said presentation was the record, and that the record was confined to the party making it.

That the presentation by Wm. R. Crockett in 1845, if needed, would not be a presentation of the claim for Anthony Crockett in his administration.

That all claims must be presented against the administrator within three years that had an existence, or were due at the date of his letters.

Judge RYLAND delivered the opinion of the court.

This was a proceeding commenced originally in the Marion county court, taken thence by appeal to the Marion circuit court, and now brought before this court by writ of error.

From the record it appears that on the 23rd day of April, 1847, the plaintiff, James V. Milan, as administrator of the estate of Anthony Crockett, deceased, caused a notice in writing to be served on the defendant, Richard Pemberton, as the executor of Jane Wilcox, deceased, informing him that on the first Monday, being the third day of May next, he, as administrator as aforesaid, would make application to the county court of said county for an allowance against the estate of Jane Wilcox, deceased, on a note of which the following is a copy, (viz:) "Twelve months after date we or either of us promise to pay Col. Anthony

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Crockett, or order, two hundred dollars for value received. Witness our hands and seal, this 3rd day of October, 1833.

JANE WILCOX.

October, 1833.

Witness : A. CROCKETT."

At the July term of said county court in 1847, judgment was rendered on this application for allowance in favor of the defendant. The plaintiff appealed therefrom, and the proceedings were duly certified to the circuit court, and at March term, 1848, judgment in that court was again rendered in favor of defendant.

From the evidence preserved in the bill of exceptions, it appears that Jane Wilcox being anxious to obtain the sum of \$200, prepared the note of which the above is a copy, and applied to Col. Anthony Crockett for the loan of that sum. Col. Anthony Crockett did not lend the money to her, but William R. Crockett did, and took the note, which she had thus prepared as above, from her, from the payment, without any alteration; that is, took the note payable to Col. Anthony Crockett, instead of to himself, being the note first prepared.

Thus the matter remained for several years. In 1838 Col. Anthony Crockett died. Jane Wilcox died in the early part of the year 1843. Letters testamentary were granted on her estate, dated 20th March, 1843, and notice calling upon the creditors to exhibit their demands for allowance against her estate, was duly published in pursuance of the statute in such case provided, dated March 30th, 1843, and appeared on that day in the Missouri Courier, a public newspaper.

This application for allowance was made at the May term, 1847, of Marion county court, and notice thereof was served on the 23d day of April, 1847, after a lapse of more than *four years*, from the date of the letters testamentary, and from the publication of the notice to creditors. On the trial in the circuit court, the plaintiff in order to show that his claim was not barred by the statute, which requires claims and demands to be exhibited within three years, proved "that on the 7th day of July, 1845, the note now sued on, was presented to the county court for allowance; that it was so presented at the instance of William R. Crockett; that Richard Pemberton, adm'r. of Jane Wilcox, the defendant, appeared therein before said court and waived notice, and several witnesses were examined to prove the signature of the said Wilcox, but not being able to prove the signature, the attorney, John D. S. Dryden suffered a non-suit, and withdrew the claim; that no trace of said proceeding before the county court appears of record."

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The defendant objected to all the evidence touching the presentation of said claim to the county court; but the court overruled the objection and heard the evidence, and the defendant excepted to this opinion of the court. The plaintiff showed his letters of administration granted on the estate of Col. Anthony Crockett, deceased, dated 23rd day of November, 1846, eight years after the death of said Crockett.

The plaintiff moved the court to decide, that if it appeared from the evidence in the cause that the note sued on was presented for allowance to the county court in July, 1845, and that Pemberton, as administrator of Wilcox, appeared there, and waived notice of the demand; and the claim was subsequently withdrawn; that this constituted a legal exhibition of the demand. That the limitation of three years did not commence running till the date of the letters of administration on Anthony Crockett's estate; and that an administrator is not barred by the statute of limitations. All of which the court overruled: the plaintiff excepted. The court found a verdict for defendant. The plaintiff moved to set aside the verdict and grant him a new trial, which the court overruled; and now plaintiff seeks to reverse this judgment of the circuit court.

In our statutes concerning executors and administrators, article 4th, sections 5, 6, 12, 13 and 14, we shall find what the law contemplates as an exhibition of a demand. Section 5th is in these words: "Every person may exhibit his demand against such estate by serving upon the executor or administrator a notice in writing, stating the nature and amount of his claim, with a copy of the instrument of writing or account upon which the claim is founded, and such claim shall be considered legally exhibited from the time of serving such notice."

Section 6. "Every executor and administrator shall keep a list of all demands thus exhibited, classing them, and make returns thereof to the county court every year, at the term at which he is to make settlement."

Section 12. "Every person desiring to establish a demand against any estate, shall deliver to the executor or administrator a written notice, containing a copy of the instrument of writing or account on which it is founded, and stating that he will present the same for allowance at the next term of the county court."

Section 13. "Such notice shall be served on the executor or administrator ten days before the beginning of such term of the court, and may be served by any sheriff or constable, or by any competent witness, who shall make affidavit to such service."

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Section 14. "The executor or administrator may appear in open court and waive the service of any such notice."

From the testimony in this case, it is apparent that the plaintiff relied upon what was done by him under this last cited clause of the statute. He proved before the court, that he had offered this claim for allowance in the county court at July term, 1845, and that the defendant waived the notice in open court. That the claim was not sufficiently proved and was withdrawn. There was an objection to this proof by parol; there was no trace of any such proceeding on the record of the county court. The testimony was offered before the court, and as there was no jury, it was right and proper for the court to hear the testimony first before it could determine upon its legality. The effect of this testimony, its admissibility, its competency were brought before the court by the plaintiff's instruction. We have no doubt that such evidence was improper; it was entirely inadmissible. No case has been found, where a party has been permitted to prove before one court of record what he did, what proceedings were had and done before another court of record in a judicial investigation by mere parol testimony. The acts, doings, judgments and proceeding of courts of record are known by the records of these courts. Such proceedings may often be amended; may be altered to suit the true state of facts; but there is always something to alter or amend by. Here there is an attempt not to alter or amend, but to make out a new subject matter altogether, and that too by the testimony of witnesses. It is admitted that there is no trace of any such proceeding as the one here proved by witnesses upon the records of the county court.

There is no proof of the waiving of notice but by parol. Why does the statute permit this waiver of notice only to be done in open court? Because it then is put on record among the proceedings of the court in adjudicating upon the claim. Had this waiver of notice been made in open court, and put on the records of the court, or on the back of the note, or on any part of the demand or claim, we should feel inclined to receive it as evidence of such an exhibiting of the claim as might warrant the court in taking it out of the statute of limitations.

I feel satisfied that there was no evidence (that is legal evidence) of any such exhibition of this claim, as is required by law, before the county court of Marion in July, 1845; and consequently the circuit court committed no error in refusing the instructions first asked for by the plaintiff.

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I see no reason why the statute of limitations should not run against an executor or administrator.

But in this case William R. Crockett might have presented this claim against the estate of Mrs. Wilcox at any time he might have thought proper. He was the bona fide holder of the note, and the real owner. He loaned the money to Jane Wilcox, and he might have used the name of Anthony Crockett any time before his death in order to collect this money; and from the parol evidence which was offered, we see that in 1845, after his death, and before administration, was presented the note in the county court.

He waited and delayed too long. The circuit court committed no error in finding for the defendant, no error in overruling the motion for a new trial, and the judgment is affirmed.

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1. A judgment of affirmance by the supreme court is understood to be a judgment that the circuit court proceed to execute its own judgment, which is pronounced to be valid and in full force.
2. When the supreme court designs to carry into effect its own judgment, a judgment of recovery must be superadded to the judgment of affirmance; and an execution from either the supreme or circuit court may enforce this judgment: but when issued from the circuit court it must be upon the *judgment of the supreme court*.
3. The lien of a judgment obtained in the circuit court in 1819, was not enforced by an execution which issued upon a judgment of the supreme court in 1823, *affirming the former judgment*.
4. An acknowledgement by the *wife* of a deed (executed by husband and wife) under the law in 1821, was sufficient to authorize it to be recorded, she being a grantor.
5. The title of a mortgage after forfeiture, is such an outstanding title as will prevent a plaintiff in ejectment from recovering.

APPEAL FROM ST. LOUIS CIRCUIT COURT.

STATEMENT OF THE CASE.

In this case, the plaintiffs below, appellees brought their action of ejectment against the de-

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fendant. Both parties claimed through Samuel Hammond as the common source of title. To show title, plaintiffs offered in evidence—

1st. A judgment in St. Louis circuit court of Relf, Chew and Clark, dated August 30th, 1819, for \$6841 81 $\frac{1}{4}$, in which case a writ of error was taken to the supreme court, bail in error given, and the case continued from term to term.

2d. A judgment of the supreme court, affirming the former judgment, dated May 22d, 1823, and for costs.

3d. An execution of fi fa casa, from the supreme court, for the sum of \$6877 43 $\frac{1}{4}$, directed to the sheriff of St. Louis county, dated May 28th, 1823.

4th. A sheriff's deed for the property in question to Relf and Chew, dated Nov. 4th 1823, recorded Jan. 27th, 1824.

5th. Power of attorney from Relf and Chew to John O'Fallon, dated Oct. 19th 1848, with power to convey lands.

6th. Relf and Chew, by attorney to J. Campbell, one half of premises sued for, to Caroline Barnes one fourth, to Eleanor McNiff for one quarter—deed dated March 19th 1845.

Admitted that Peter McNiff is the husband of Eleanor McNiff; that John Barnes was the husband of Caroline Barnes, who died in May, 1845, and that there was issue born alive of the marriage.

Monthly rents and profits also admitted, and damages at the same rate admitted since the commencement of the suit.

Defendant then offered in evidence—

X 1st. A deed from Samuel Hammond and wife to Robert Wash as trustee of the bank of Edwardsville, dated May 1st 1821. Recorded Aug. 23d 1821. This deed was acknowledged by Mrs. Hammond only before a justice of the county court of Jefferson county, and was not acknowledged by Hammonad at all. The deed was admitted subject to exceptions on the part of the plaintiffs.

2d. Judgment in favor of T. McGill vs. bank of Edwardsville of July 31, 1833 on publication \$914 17.

3d. Sheriff's deed under said judgment to James Mason, dated Jan. 4 1834. Recorded Jan. 9th 1834.

4th. A judgment in favor of Stephen Wiggins vs. Sammuel Hammond, April 26th 1821 for—

5th. Sheriff's deed under said judgment to James Mason, dated Jan. 4th 1834. Recorded Jan. 9th 1834. Fi fa issued 1833—levy 16th Nov. 1833, and sale 9th Dec. 1838.

6th. Decree of circuit court vesting title of Wash to the premises in James Mason, dated May 19th 1834. No person representing the plaintiffs or their grantors, nor Samuel Hammond or his heirs, and Wash appeared and confessed the case.

7th. Deed from Robert Wash under the decree to James Mason, dated May 19th 1834. Recorded June 7th 1834.

8th. Admitid that defendant holds by mesne conveyances from Mason.

9th. Robert Wash called as a witness testified, that he acted as trustee under the deed from Hammond; that the original was not in his possession; that he was passive in the matter; that he exercised no control over it, the property. That at the instance of Mason sales were made of the property in St. Louis and Jefferson counties. There were no buildings on the lot Mason directed me to sell, and I sold and made deed under the decree. I sold only under that decree, and in no other way.

John B. Belcom called—testified that he had known the premises since 1812; knew Shope then; that there was a fence round it in 1820 and 1822; could not say whether Shope had it in possession or some one else. It was the same lot on which Shope lived. The house now on it was built by Lux some 15 years ago.

Joseph C. Brown testified that in 1835 he made surveys of the city, and that he was obstructed in fixing the corner of the block by the house now on it. The lot was enclosed in 1835.

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It was admitted that the defendant and those under whom he claims, have been in actual possession since Feb. 8th 1836.

The plaintiff then offered in evidence the bill and answer in the case of Mason vs. Wash and Hammond.

This closed the evidence of the case, and the court, at the request of the plaintiffs, gave the following instruction, to the giving of which the defendant excepted.

The judgment of Relf, Chew and Clark, was a lien on the premises claimed in this cause, and the execution and sheriff's deed vested a title in Richard Relf and Beverly Chew, and which the jury believe has been regularly deduced from them to the plaintiffs, they are entitled to recover.

The defendant then asked the following instructions, to which the court refused, to which refusal the defendant excepted.

1st. That the deed from Hammond to Wash of May 1st, 1821, vested in Wash the legal title to the premises sued for in this action; and that no subsequent grantee or assignee of Hammond can maintain ejectment as against the grantee or assignee of Wash, and therefore the plaintiffs claiming under a judgment against Hammond, of May 22d 1823, and a sale under that judgment, are not entitled to recover.

2d. The deed of Hammond to Wash, of May 1st 1821, if true and genuine, gave to Wash, and those claiming under him, the constructive possession of the premises sued for, and against this constructive possession nothing can avail the plaintiffs but an actual possession adverse to Wash and those who claim under him.

3d. The plaintiffs cannot maintain their action, unless it appear from the evidence that the plaintiffs, their ancestors, predecessors or grantors, were seized or possessed of the premises in question within twenty years before the commencement of this action.

4th. The plaintiffs cannot maintain their action, unless it appear from the evidence that the plaintiffs, their ancestors, predecessors, grantors, or persons under whom they claim, were seized and possessed of the premises within ten years before the commencement of this suit.

5th. The deed from Hammond to Wash of May 1st 1821, conveyed to Wash the legal title, and the judgment in the supreme court of May 22d 1823, and the sale under the same, conveyed no title upon which the plaintiffs can maintain an ejectment.

6th. Under the evidence offered in this case, the plaintiffs are not entitled to recover.

7th. It being admitted by both parties that Samuel Hammond had the legal question to the lot in question, the deed from Hammond and wife (a copy of which has been given in evidence) vested the legal title to the lot in Robert Wash.

8th. The legal title to the lot in question, if the same was vested in Robert Wash by the deed, a copy of which was in evidence, was not divested out of said Wash by the sheriff's deed to Relf and Chew, given in evidence by the plaintiffs.

9th. The judgment of the circuit court of St. Louis county in favor of Relf, Chew and Clark, against Hammond, after the same had been affirmed by the supreme court, might have been legally executed by writ of execution issued from said circuit court; if the plaintiff had chose to seek that remedy.

10th. The lien of the judgment of the circuit court, and the judgment of the supreme court in the case of Relf, Chew and Clark against Hammond, are separate and distinct; and an execution sale of the land under one of these judgments, cannot hold the land by force of the lien of the other judgment.

The jury found a verdict for the plaintiffs under the instruction of the court, and the defendant filed his motion for a new trial, which was overruled by the court, and the defendant excepted, and brings the case to this court by appeal.

BATES, for appellant.

1. There was no judgment of the *supreme court* to warrant the execution and sale. It was

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not a judgment of recovery of debt or damages, but a judgment of affirmance only, with no award of execution but costs.

2. But if execution could issue for debts or damages on such a judgment, still that judgment bearing date May 22, 1823, could not overreach and destroy the conveyance from Hammond and Wash of May 1, 1821, for the liens of the judgment of the two courts are distinct.

3. The execution under which the sale was made was void. It is not only for a wrong sum, but there does not appear to have been any such judgment as is therein recited.

4. But supposing the judgment, execution and sheriff's deed to Relf & Chew, to be unimpeachable, still two of the plaintiff's, McNiff and Barnes, obviously have no title. They claim as tenants by the courtesy, by deeds made to their wives respectively, by Relf & Chew, on the 19th of March, 1845, whereas the record shews that the defendant and those he claims under, were in the actual adverse possession so long ago as the 10th February, 1836, and ever since. And to Mrs. McNiff and Mrs. Barnes were never *elised*, and therefore there can be no tenant by the courtesy. 2 Bl. C. 127.

As to *instructions* refused and given, the defendant asked ten, all of which were refused. Some of them were so obviously legal and right, that the error of refusing them will appear without argument. They need only be read. The plaintiff below asked only one instruction, which covered the whole case. It was given and is in the following words : "The judgment of Relf, Chew & Clark was a lien on the premises claimed in this cause, and the execution and sheriff's deed vested a title in Richard Relf and Beverly Chew, and which, if they believe has been regularly deduced from them to the plaintiff's, they are entitled to recover."

This instruction is wrong for many reasons, only a few of which will be noted here.

1. It assumes that the judgment of the supreme court on which the execution issued was a lien so as to overreach the anterior deed from Hammond to Wash, whereas by the statute, the judgment was only a lien from its date. Art. 1822; 15, 61, 1 Terl. L. 855.

2. It assumes and decides the regularity, sufficiency and mutual conformity of the judgment, the execution and the sheriff's deed. In short, it decides every thing for the jury but one point, and that is a matter of law.

3. It leaves to the determination of the jury the question of law, whether or no McNiff & Barnes were tenants by the courtesy.

HAIGHT, for appellee.

1. The deed by Hammond and wife to Robert Wash was definitely acknowledged, and therefore not legally seconded. 1st. Vol. Territorial laws, page 543, sec. 2; sec. 4 of act of 17, same page, repeal section 8 of act of 1804, page 46, because 2d section of act 1817 is repugnant to 8th sect. of act of '04.

2. The deed by Hammond and wife not being recorded within *three months from its date*, is void as against sheriff's deed to Relf and Chew, which was recorded within three months from its date. 1st. Vol. Terr. laws, page 543, section 2nd. The acknowledgment even of Hammond's wife was good for nothing to convey her separate estate, because her husband did not unite in the acknowledgment. Terr. laws, vol. 1st, page 756. The wife is not, and cannot be a grantor or bargainer separately from her husband. The two are in law *one party*. Her civil existence is merged in her husband's. She can do nothing without his consent.

3. The trust deed has expired by limitation. The notes are outlawed to secure which it was executed. Terr. laws, vol. 1st, page 143. It cannot be set up to defeat plaintiff's title.

4. The defendant in error claims that there was tenancy by courtesy created in Barnes or McNiff, because there was an adverse possession, and the wife was not actually seized, &c. He cites law from Blackstone, New York and Kentucky, to prove this. In England, New

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York and Kentucky, a deed was void where there was adverse possession by the old antiquated theory of the English common law. Of course no testimony by the courtesy could be created by a void deed. But in Missouri the rigid rules of the common law is wisely abrogated, and adverse possession in Missouri does not affect the validity of deeds, the transfer of real property, on the creation of estates. The law in relation to this subject is the reverse in Missouri of the English, New York and Kentucky law. The actual possession, therefore, is of course not necessary to create tenancy by the courtesy or any other species of estate.

5. The judgment in favor of McGill vs. Bank of Edwardsville introduced by defendant, was rendered in '33. It is difficult to see by what process of legal reasoning that is set up to defeat a title under a judgment either in '19 or '23. The judgment of Wiggins vs. Hammond, also set up by defendants, slumbered from '21 to '33 or '34, before execution or sale, and the lien was too effectually dead to be exhumed after a lapse of ten years.

6. The lien of the judgment in favor of Clark, Relf and Chew vs. Hammond, in supreme court, related back to the lien of the judgment in circuit court. The lien attached in 1819 was a component part of the judgment in supreme court. It was more than an incident. It was an element inseparable by legislature or court. If clerk of circuit court executed the affirmed judgment, he executed the lien which attached in '19. If clerk of supreme court executed it, he executed the lien. Which ever court executed, executed the lien with it necessarily.

1st. vol. Terr. laws, page 855, sec. 60.

3 Smedes & Marshall, p, 143; Planters bank vs. Colvit; see C. J. Sharkey's opinion.

Judge NAPTON delivered the opinion of the court.

The principal question in this case is, whether the lien of the judgment obtained by Relf & Chew in 1819, was enforced by the execution which issued upon the judgment of the supreme court in 1823 affirming the former judgment.

The law relating to the manner of executing the judgments of appellate courts in Missouri, has not been materially changed since the act of Oct. 1, 1804, under the first grade of territorial government. The fourth section of that act provided, that "on all writs of error, it shall be lawful for the general court to issue execution or remit the cause to the inferior court, in order that on execution may be there issued, or that other proceedings may be had thereupon." By the act of July 3, 1807, provision was made for appeals from the common pleas to the general court, and it was declared the duty of the general court, where an appeal was duly entered to examine the record and award a new trial, reverse or affirm the judgment of the court below, or give such judgment as the court below ought to have given. It is further declared, that "the general court may order the record aforesaid with *their decision and determination* thereon written and duly certified, to be remitted to the said inferior court, on payment of the fees incurred in the said general court, and the *same decision and determination* shall be duly carried into exe-

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cution by such inferior court, or the general court may award execution to carry into effect its decision and determination."

When the State government went into operation, and the supreme court superceded the general court, the act of Dec. 12, 1820, enacted that "When any cause may be finally determined and judgment rendered, or decree pronounced therein, the record thereof, with the decision thereon written, may be certified and remitted to the appropriate court, there to be carried into execution and effect, or the supreme court may proceed to carry the same into effect by execution or other proper process, issued into any county within this State." The act of Jan. 11, 1822, is more explicit. "In all cases of appeals or writs of error decided by the supreme court, the said court may order the record in the cause, with their decision and determination thereon written and duly certified, to be transmitted to the proper circuit court, on payment of the costs incurred in the supreme court, and such decision and determination shall be duly carried into execution by such circuit court, or the supreme court may award execution to carry said decision and determination into effect." The law as it stands now, and has stood in the versions of 1825 and 1835, is substantially the same. "The supreme court, upon the determination of any cause on appeal or error, may award execution to carry the same into effect, or may remit the record, with their decision thereon, to the circuit court from whence the cause came, and such determination shall be carried into execution by the circuit court."

If the construction of these statutes were now an open question, unaffected by a long continued practice under them, there would be strong grounds for contending that the judgment of the supreme court was intended to be the only judgment which could be executed, after a supersedeas on error or appeal; that this judgment, when it was in affirmance of the judgment of the inferior court, should be not only a judgment of affirmance, but a formal judgment of recovery for the damages or debt and costs embraced by the affirmed judgment, and also for the costs of the supreme court. Upon this construction, the execution, whether issued from the clerk's office of the supreme or circuit court, would issue upon the judgment of the supreme court. The question would then arise whether such execution would enforce the lien of the judgment of the inferior court. In such case, it would be obvious that if the execution upon the judgment of the appellate court would not enforce the lien of the affirmed judgment; the lien was destroyed by the supersedeas. It could be enforced in no other way, the judgment of the

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inferior court being merged certainly for all purposes except the lien, in the judgment of the appellate court.

Our statutes have, however, received a different construction in practice. Judgments of affirmance have been merely such in form, without any additional judgment *quod recuperet*. A certified copy of the record of this judgment, transmitted to the inferior court, has been understood to remove the suspension of the judgment of the inferior court, occasioned by the supersedeas, and to give authority for the issuance of an execution upon the judgment affirmed. An execution issues from the supreme court for the costs of that court. The practical construction of the statute has been to limit executions upon the judgments of the supreme court to cases where a new judgment of recovery is entered in this court, and in cases of affirmance to let the execution go from the circuit court upon the judgment of that court.

Under these circumstances, this court would hardly feel itself at liberty to give a construction to these acts variant from the received usage of the court, and the general understanding of the bar for a period of nearly thirty years. The propriety of the practice may well be doubted, but I confess myself unwilling to hazard an opinion in opposition to a practice so long acquiesced in by those concerned in the administration of the law. That the practice of the clerks has occasionally varied, is seen by the facts of the present, and the case of Evans vs. Wilder (5 Mo. Rep. 322) yet in these cases the form of the judgment is the same. The judgments are simply of affirmance, and not judgments of recovery. The form of a judgment of affirmance in the supreme court of New York, like that in the court of King's bench contains a judgment of recovery for the damages, or debt and damages of the judgment of the inferior court, as well as a judgment of affirmance. The judgment of affirmance might be construed as embracing substantially a judgment for the recovery of the debt and damages of the affirmed judgment, if the statute were construed to authorize an execution only upon the judgment of the supreme court. Such a construction, indeed, must necessarily be given to it, upon this view of the law, or it must go for nothing, and remain forever unexecuted. But if we adopt the construction which has been practically in vogue from the commencement of our State government, and consider that the judgment of affirmance merely removes the supersedeas from the affirmed judgment, and permits the execution to go upon the latter judgment, the necessity for construing the judgment of the supreme court as embracing in substance a judgment of recovery, is removed. Indeed, it

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would be difficult to reconcile the practice under the law with the idea that the judgment of affirmance, as it is usually entered, is a substantive and independent judgment of recovery. If it were so, it must follow that the judgment of the inferior court, upon which it is based, could no longer be executed, except through the medium of the judgment into which it has merged. It is clear to my mind, upon any construction of our statutes that it was not designed that there should be two judgments of recovery in force at the same time, either of which could be executed at the option of the party in whose favor the judgments were rendered. The practice, therefore, of executing the judgment of the circuit court, after an affirmance by the supreme court, is based upon the idea that the judgment of the supreme court in cases of affirmance, is not a distinct and independent judgment of recovery, which may be enforced by execution, but merely a determination on the part of that court that the judgment of the circuit court is right, and that it should therefore remain in full force, and that the party holding it should no longer be restrained from enforcing it by execution. No doubt, if it were desirable, the supreme court might enter a judgment of recovery, at the same time that a judgment of affirmance is given, and if it did so, at the suggestion of parties, or upon its own convictions of propriety.

I should think that, under our statute, no execution could then issue upon the judgment of the circuit court, although an execution might issue upon the judgment of the supreme court, either from the clerk's office of that court, or of the circuit court. It being the duty of the circuit court to carry into effect the determination of the supreme court, the execution, in such a case, whether it is issued by the circuit court or supreme court, must issue upon the judgment of the supreme court. Such has been the uniform practice in all cases where judgments of recovery have been entered in the supreme court. The judgment of the inferior court is first reversed, unless it be designed to superadd a judgment of recovery to a judgment of affirmance, (which in practice has never prevailed) and a judgment for debt and damages is then awarded, and upon such judgment an execution may issue from the supreme court, or upon the certified transcript of such judgment, the circuit court may issue execution. The execution, however, in all such cases, must issue upon the judgment of the supreme court. No question can arise about the lien of the judgment of the inferior court, for that judgment having been reversed, and a new judgment entered in the appellate court, the execution can of course only enforce the lien of the latter judgment.

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The lien of the first judgment is necessarily lost by its reversal. Hence, I apprehend, it has happened, that no application has been made to the supreme court, in cases of affirmance, for the additional judgment in that court of recovery—it being greatly more advantageous to the party having the judgment below, to be permitted to enforce it, and in that way to enforce its lien.

From this view of the statutes, and the practice under them, I conclude that a judgment of affirmance by the supreme court has been understood to be a judgment that the circuit court proceed to execute its own judgment, which is pronounced to be valid and according to law and in full force. This determination or decision of the supreme court being duly certified to the circuit court, is carried into effect by an execution upon the judgment so declared to be affirmed. Where the appellate court designs to carry into effect its own judgment, and that judgment is in accordance with the previous judgment of the inferior court, a judgment of recovery must be superadded to the judgment of affirmance and an execution from the supreme court or from the circuit court, may enforce this judgment.

We do not wish to be understood as deciding, that the execution which issued upon the judgment of the supreme court in 1823, in favor of Relf and Chew, was void. That question arose in the case of Evans vs. Wilder, and the court was then of opinion that the judgment was good, at least for costs, and seemed inclined to sustain a title acquired under the execution, although it was intimated that such an execution would be set aside upon a direct application for that purpose. We shall not disturb that decision. Admitting the execution in favor of Relf and Chew to be valid, it would not enforce the lien of the judgment of the circuit court rendered in 1819.

In 1807, judgments of the court of common pleas were declared liens throughout the county, and judgments of the general court throughout the territory, both liens continuing for five years. In 1815 the court of common pleas was abolished, and its duties divided between the circuit courts and county courts. This was the state of the law in 1819, when the judgment in favor of Relf and Chew against Hammond was rendered. In 1820 the State government went into operation, and judgments of the supreme court, and the superior court of chancery were declared liens throughout the districts in which they were rendered. In 1822 the duration of their liens were limited to three years.

In the case of Planters' bank vs. Calvet (3 Smedes and Marshall 192) the question was distinctly presented, whether an execution upon a

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judgment of affirmance by the supreme court will enforce the lien of the affirmed judgment. Under the statutes of Mississippi, the execution issued upon the judgment of the supreme court, although it issued from the clerk's office of the inferior court. Hence it is apparent, that if the lien of the judgment of the inferior court was not enforced through the medium of the judgment of affirmance, the result must have been that the supersedeas destroyed the lien. To sustain the lien under these circumstances, it was necessary to hold, that for this purpose alone, the judgment of the inferior court was not merged or extinguished by the judgment of affirmance, although to every other intent it clearly was. The supersedeas rendered it impossible that an execution could ever after issue upon the supersedeas judgment. Whatever disposition might be made of the judgment, the judgment of the court to whose revision it was submitted, was alone to be executed. The court, however, which decided this case, arrived at the conclusion that the lien still existed, although it would not be enforced directly by any proceeding upon the judgment from which it sprung. It was enforced indirectly through the judgment of the supreme court. We are not under the necessity of determining this question. Although one cannot but admire the ingenuity and learning which the judge, who delivered the opinion of the supreme court of Mississippi, brought to bear upon the question, it is difficult to reconcile some of his positions with general principles. To maintain the lien of a judgment, which can never be enforced, except through the medium of a second judgment, which second judgment had also a lien of its own, would seem to be inconsistent with the nature of a lien. No such difficulties present themselves here, in sustaining the continuance of the lien after a supersedeas, since the judgment which creates it may be directly enforced upon its affirmance by the appellate court. There is no necessity for enforcing it through an execution upon another judgment. Under our statutes in 1823, the lien of the judgment of the supreme court extended throughout the district, whilst that of a circuit court judgment was confined to the county. The lien in both instances was limited to five years. In Mississippi, there was no limit to the duration of the lien, and it does not appear that the liens of the two judgments were in any respects different. The construction which we have given to our statutes will avoid all conflict between the liens of the several courts, and render it unnecessary to tack one lien to another. The lien of the judgment of the circuit court will be lost whenever there is a new judgment of recovery given by the supreme court, and when the

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judgment of the supreme court is simply one of affirmance, the execution of the judgment of the circuit court will of course enforce the lien of that judgment. In Mississippi, the party could not enforce his affirmed judgment except by an execution upon the judgment of the supreme court which affirmed it. There was a manifest injustice in holding the lien of the judgment to be lost by the supersedeas, where the legislature had not expressly declared that it should be, and the conclusion to which the supreme court of Mississippi arrived, in permitting the lien to be enforced indirectly by an execution upon the judgment of the supreme court, was no doubt in conformity to the true intent of the legislature. But inasmuch as under our statute the lien may be directly enforced, the spirit and object of our legislative enactments on this subject may be carried out without resorting to the forced construction to which the Mississippi court was driven.

As the plaintiff's title will not reach further back than May 1823, when the judgment was rendered under which they purchased, it becomes material to examine the defendant's title under the mortgage to Wash. The deed was dated May 1, 1821; was acknowledged by Mrs. Hammond on the 8th June, 1821, before a justice of the county court of Jefferson county, and recorded in St. Louis on the 23d day of August 1821. This deed was a deed to Robert Wash as trustee for the benefit of the bank of Edwardsville, and empowered Wash to sell the land in the event of the non-payment of the above \$200, which Hammond had borrowed from the bank, and which the deed was given to secure. The objection to this deed is, that it was not properly acknowledged, so as to authorize it to be recorded.

The act of Oct. 1, 1804 provided, that all deeds, affecting lands, should be acknowledged by one of the grantors, or proved by one or more of the subscribing witnesses, before one of the judges of the general court, or before one of the justices of the court of common pleas of the district where the land conveyed lies, and should be recorded within twelve months. The act of Feb. 1, 1817, provided, that title bonds, and other written instruments, touching a mere equitable interest in land, should also be acknowledged and recorded. Three months, instead of twelve, was the period limited by this law for recording. Justices of the peace were also by this law authorised to take the acknowledgment of deeds, and all previous acts repugnant to its provisions were repealed. No change was made in the mode of acknowledging deeds. The act of Oct. 1, 1804, was therefore the only

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law prescribing the mode of acknowledging deeds, at the time the deed to Wash was acknowledged.

Whilst the only object of recording conveyances was to give notice to subsequent purchasers and mortgagees,, it is clear, that this purpose could be attained by recording the deed upon the acknowledgment of one of the grantors, as well as upon the acknowledgment of all, where there was more than one grantor. It was no part of the original purpose of our recording acts, which were borrowed from the registry laws of England, to facilitate the proof of the execution of deeds, upon their introduction as evidence in court. It was not until 1825, that the acknowledgment of a conveyance, in the mode prescribed by statute, was allowed to dispense with any further proofs of its execution. As the law stood in 1821, when the deed from Hammond and wife to Wash was executed, it was permitted to be recorded upon the acknowledgment of one of the grantors, and the record merely imported notice to subsequent purchasers and mortgagees. Had the deed been offered in evidence before the passage of the act of 1825, concerning conveyances, its execution must have been proved in the same way as though it had never been recorded. But the act of 1825, whilst it permits for the first time conveyances acknowledged according to law to be read in evidence without further proof, also provides for their acknowledgment by all the grantors, as a pre-requisite to their being recorded. This change from the act of 1804 was rendered necessary by the additional object proposed to be accomplished. The only object of the first act was to give notice of the deed, whilst the act of 1825 not only aims to effect this, but also to facilitate the introduction of deeds in evidence, and therefore its provisions are adapted to both purposes.

If Mrs. Hammond was one of the grantors in the deed to Wash, then an acknowledgment of the deed by her was sufficient, under the law in 1821, to authorize it to be placed upon record. The counsel for the plaintiff in error insists, that she was not—that the husband and wife together constitute but one party to a conveyance. It is very true, that for many purposes, the husband and wife are considered in law as one, and under our statutes, the wife cannot convey any interest in real estate without joining her husband in the conveyance. If the act of 1804 had made the record of a deed *prima facie* evidence of its execution, the argument in favor of holding the husband and wife as constituting but one grantor under the act, would be strong, if not conclusive,. The wife's acknowledgment would be a nullity, unless the husband had also executed the deed, and if the record is to prove execution of the deed,

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it would seem necessary that an acknowledgment by the party whose execution of the deed the record was designed to establish, should be pre-requisite to an authority to record. But as the act has no such object, and merely makes the record notice, there is no motive for giving the act such a construction. The notice is effected just as well by the record upon the wife's acknowledgment, as though the husband had acknowledged it. The execution of the deed by the husband must be proved aliunde. Without such proof, it can be of no avail for any purpose, and with such proof, the record upon the sole acknowledgment of the wife, comes within the intent and letter of the act of 1809. No question has been made in this case, in relation to the execution of this deed by Hammond, or in relation to the proper mode of proving such execution. The record leaves us to assume that the proof on this head was satisfactory.

It is supposed, however, that the title under Wash fails, on account of the invalidity of the decree obtained in 1834, in favor of Mason as the assignee of the bank of Edwardsville the *cestine que trust* in the deed of Hammond. The objection to the decree is, that the purchasers from Hammond, subsequent to the execution of the mortgage or deed of trust, were not made parties to the suit, and the case of Watson and others vs. Spencer (20 Wend. 260) is cited as authority, In that case, the plaintiffs were the purchasers of the equity of redemption, both by deed and under executions. The mortgage had, before the mortgagee brought his bill for foreclosures, sold to one of the plaintiffs, and the other, Watson, had bought under an execution. The bill was brought against the mortgagor alone, and the court held that the decree of foreclosure, and the sale in pursuance thereof, did not affect the plaintiffs, who had purchased from the mortgagor, and who were not made parties to the bill in equity, and that the purchaser, under the decree, although in possession, was a mere stranger, and could not protect himself against the owner of the equity of redemption, by setting up an outstanding title in the mortgagee. This last proposition is obviously based upon a construction of a mortgage peculiar to the State of New York. The courts of that State hold, that the freehold is in the mortgagors, and that the mortgagee has but a chattel interest. 2 Cow. 19; 11 J. R. 534. The mortgagee, before foreclosure, cannot maintain ejectment against the mortgagor; (13 Wend. 485) but the mortgagor, after forfeiture, is still treated as the real owner, and may maintain ejectment against any one, except perhaps the mortgagee. This doctrine results from a statutory provision of that State, and is certainly not the law lien as to the

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other branch of the decision, that the purchasers from the mortgagor must be made parties to the bill seeking a foreclosure, it may be observed, that this court in the case of the heirs of Mullanphy vs. Russell (4 Mo. R. 319) has decided otherwise. In relation to the propriety of this decision, it is unnecessary to venture any opinion. The statute now clearly and expressly requires subsequent incumbrancers to be notified.

Admitting the decree to be void, how can the plaintiffs recover upon the received construction of mortgages in this State, with an outstanding title in Wash. It is said, indeed, that a presumption of satisfaction will arise from lapse of time, and this may be true as a general proposition ; but how can such a presumption be indulged in here with the record of this chancery proceeding staring us in the face. If the decree be a valid one, the title of the purchaser under it is valid, and if the decree be a nullity, the mortgage or deed of trust remains unsatisfied. The presumption which might arise from lapse of time is rebutted. The record is certainly conclusive to show that a proceeding was had to foreclose the mortgage, and the nullity of the proceeding must show that the foreclosure was not effected, and that the deed remains in full force, with the legal title in the trustee or mortgagee.

The other judges concurring, the judgment is reversed.

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When a judgment against the deceased is presented in the county court for allowance against the estate, it is the duty of the court to classify it for payment.

ERROR TO LEWIS CIRCUIT COURT.

1. The appeal was properly taken on the refusal of the county court to classify the plaintiff's demand for payment. Rev. Code, 1845, administration, art. 8, sect. 1. It is perhaps true that the administrator might have been sued on his bond for not paying the plaintiff's judgment : but the remedy adopted by the plaintiff of procuring an order classifying his demand and ordering payment, was shorter and better.

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2. It may have been the duty of the administrator to classify the demand himself ; but not doing it, it was the plaintiff's right to have done by the court. No affidavit was necessary, for the demand had already been established according to law ; and the order of classification merely wanting for its complete allowance. See administration law, Rev. Code 1845, art. 4, sect. 22. When a demand is exhibited for allowance in the county court, two things are necessary to the allowance, 1st. The ascertainment of the debt. 2d. The determination of its class. Then it may be, must be paid by the administrator. But when a judgment is obtained against the administrator in another court, as in this instance, there is no allowance until the judgment is filed in the county court ; and then the only act to complete allowance is classification, which was done in this case.

3d. The county court by refusing to allow and classify in case, have forbidden the administrator to pay, which is nullification of the judgment.

4th. It may be contended that mandamus is the proper remedy, but not with any success if the position assumed by plaintiff is good, that classification is allowance in this case.

5th. It was contended that the plaintiff's demand was barred by three years limitation ; but not so, for the demand was legally established by the scire facias against the administrator, and besides there never was any notice given of the emanation of defendant's letters.

Judge Birch delivered the opinion of the court.

The judgment of this court upon the principal facts of this case, may be seen by reference to its former opinion, (10 Mo. 382.) That judgment having been properly certified to the circuit court, it became its duty, upon proper motion, to declare the law to be that the county court should classify the demand of the plaintiffs as originally prayed for ; and the proceedings of the circuit court, certified to the county court, would constitute the guide of that tribunal. The judgment of the circuit court, therefore, which dismissed the cause is reversed, and the cause remanded for the purpose of being proceeded in conformably with this opinion.

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1. Where a valid legal objection appears upon the face of the proceedings, through which the adverse party can alone claim title to the complainant's land, there is not in law such a cloud upon the complainant's title as to authorise him to apply to a court of chancery to set aside such proceedings.
2. But where the claim of the adverse party to the land is valid upon the face of the proceed-

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ings, or of the instrument sought to be set aside, and extrinsic facts are necessary to show the invalidity of these proceedings, the court of chancery may interfere to remove such a cloud upon the complainant's title.

9. Facts stated which the court consider sufficient to warrant a court or jury in presuming that certain private property has been dedicated to public use.

APPEAL FROM ST. LOUIS CIRCUIT COURT

GAMBLE, for appellant.

The alley was private property, and the city can only pave alleys, streets, &c., which are public, already dedicated to public use, and the attempt to coerce the appellant to pay for the paving his own land, by selling his other land, is an injury which a court of equity should restrain.

The city clearly had no power to pave the alley unless it was public. See City Charter laws, 1839, page 164; laws 1841, page 137; laws 1843, page 123.

The alley was not dedicated to public use as a public alley. The only dedication pretended is by the proprietor suffering the land to remain unenclosed. This cannot amount to a dedication without the assent of the proprietor to its use by the public as a public alley. It is his assent to its use as such joined with the actual use which creates the dedication. Cincinnati vs. White, 6 Peters, 431—particularly 440; Barclay vs. Howell, 6 Peters, 498.

And such assent will not be presumed from the use without concurring circumstances, as length of time, &c., for if all lands unenclosed, and over which other persons may pass with the knowledge of the proprietor, and unrestrained by him, be presumed dedicated to public use, then nine-tenths of the land in Missouri is so dedicated, which cannot be the fact. The section of the charter (7th section of 6th art.) which gives to the mayor and city council power to tax lot holders according to the respective points owned by them, is unconstitutional. Constitution, art. 13, sec. 19.

BLENNERHASSETT, for appellee.

The facts disclosed by complainant's bill show that the alley in question was dedicated by the owner thereof, the complainant, to public use. 'Tis true that the complainant did not convey the premises through which said alley runs, by *deed*, to the city; but this is not necessary. A dedication can be effected by parol as well as by deed; nor is there any particular form necessary. If the owner in fee sets apart the premises for a street or alley, though it be for his own convenience, and permits it to be used by the public indiscriminately, the law will presume a dedication, and to rebut this presumption, he must show affirmatively that he prohibited its use as a street or highway. The city of Cincinnati vs. White's lessees, 6 Peters R. 431, and the cases there cited.

If this alley was dedicated to the city for public use as claimed, the corporation possessed ample power by the charter of 1839 to pass such ordinances as were necessary to place it in such a condition as would prevent any detrimental consequences to the general health of the citizens; in other words, the city had power to remove the nuisance, which by the reports of the city engineer, as set out in the answer, existed there at the expense of the owners. Art. 3, sect. 1, clauses 6 and 8; art. 6, sec. 7 of the charter of 1839, and same clauses and sections of art. 3, and same section of art. 6, of the amended charter of 1841.

If the foregoing positions should be regarded as untenable, and that the city acquired no

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title whatever, and that the alley and the ground on which it was laid out was, and remained the property of the owner, then it is contended that these facts appearing on the face of the proceedings, the complainant is not entitled to relief in this court, he having a complete and perfect remedy at law; he could set up the same facts on which he now claims relief, as a defense against an action which the purchaser at the tax sale may bring to recover possession of the property sold, or he may pay the tax assessed, and recover it back in an action at law against the city, regarding it as a compulsory payment. *Van Deren and others vs. Mayor, &c. of New York*, 9 Paige 388; *West and others vs. Mayor, &c. of New York*, 10 Paige, 539; 17 Miss. R. 461; 12 Pick. R. 206; 4 Pick R. 361; 6 Conn. R. 223; 12 Pick. R. 7; 10 Conn. R. 127.

It is claimed by the complainant that the proceedings upon the assessment are void; if so, a purchaser at a sale, under such assessment, could not obtain a *prima facia* title to lands sold for the payment of the assessment, and these facts appearing in the bill, a court of chancery has no jurisdiction to interfere and set aside the assessment, nor is there in law such a cloud upon the complainant's title as to authorize him to apply to a court of chancery *id id*.

The complainant seeks to restrain the collection of a mere pecuniary demand, unaccompanied by any acts on the part of the defendant which would make such collection unconscienable; it is not claimed or pretended that the defendant is about doing any act to the property of the defendant which would work an irreparable injury or mischief. If the city of St. Louis cannot collect the amount assessed, it must follow that it had no power or authority to abate the alleged nuisance by the improvement of the alley, and that by said improvement the city was exercising an unwarrantable authority over the complainant's property. Taking this view of the case, it is insisted that the complainant should have invoked the equitable power of this court to prohibit the making such improvements. Having omitted to do that, it is now too late to ask this court to restrain the collection of the sum assessed.

Judge NAPTON delivered the opinion of the court.

This was an application for an injunction. The complainant alleges, that he is the owner of two lots in block No. 86 of the city of St. Louis, one fronting on Pine st. about one hundred feet, and another lot of 64 by 101 feet, near the middle of the block, and that for his own convenience he appropriated about 15 feet taken from each lot for a private alley; that at the time he made this appropriation the remainder of the block was vacant, so that wagons, drays, &c., could pass and repass from Pine to Chesnut street; that when the owners of the other lots made their improvements, they conformed to the lines of the private alley; so that it remained open for the public from Pine to Chesnut street. The complainant further states, that the city corporation caused the said alley to be paved, and after thus taking his private property for public use, presented him a bill of \$117 06 as the proportion assessed on him, and demanded payment, which being refused, the city was proceeding to sell his lots for the payment of these taxes, by which a cloud would be brought upon his title, &c.

The answer of the city admitted the ownership of the lots in complain-

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ant, the grading and paving of the alleys, and the attempt to force payment of his assessed taxes, but asserted that the charter and ordinances of the city authorised the proceeding. The answer admits that complainant have laid out the alley for his own convenience, and that the other proprietors may have been influenced by similar motives in conforming their buildings to the lines of the alley; but insists that the alley was thus open in 1829, and continued so with the full knowledge and consent of complainant. That in September, 1839, Rene Paul, city surveyor, reported to the board of aldermen that said alley had been surveyed by him as city surveyor, by authority of the proprietors, and that the acquiescence of the complainant and the other proprietors in the use by the public, and the survey without objection, constituted a dedication of this alley to public uses; and further, that whether it was a public or private alley, the charter gave the city authorities power to grade and pave it at the expense of the proprietors of the adjacent lots. The answer relied upon the charter and various ordinances of the city council as fully authorising what their officers had done in the premises.

To this answer there was a replication, and the cause coming on to be heard upon the pleadings and proof, the injunction was dissolved. The questions chiefly discussed in this case, are presented by the record in such an unsatisfactory shape as scarcely to warrant us in expressing a definite opinion upon them. The ordinances of the city council, to which reference is made by the answer, have not been preserved upon the record, nor has the evidence, if any was offered in the court below, been saved by bill of exceptions. The case was heard upon the bill, answer and testimony, as the record states, but there is no testimony before us.

The question of jurisdiction about which much has been said in the argument, seems not to have been made in the circuit court. There was no demurrer to the bill, nor did the answer set up any such defence. There does not appear to be any material difference of opinion in relation to the grounds upon which a court of chancery is authorised to interpose its powers in cases like the present. The only dispute is as to the application of the principle agreed on to the facts in this case as they are disclosed upon the record. It is conceded that where a valid legal objection appears upon the face of the proceedings, through which the adverse party can alone claim any right to the complainant's land, it is not such a cloud upon his title as will authorise a court of equity to stay proceedings; but where the claim is valid upon the face of the instrument on the proceedings sought to be set aside, and extrinsic facts are

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necessary to show the invalidity of these proceedings, a case is made out for the interference of the chancellor. It is obvious that if the objections now taken to the proceedings of the city were limited to the one which relies upon the unconstitutionality of the ordinance which authorises the assessment of the paving tax, and fixes the ratio upon the owners of the lots adjoining the alley or street, there would be no necessity for a court of equity to interfere. That question could as well be tried in examining the purchaser's title at law. It would strike at the foundation of his title, and would be apparent upon the face of his title papers. But the principal ground upon which the complainant relies, is the position he assumes that the alley upon which the city authorities have entered is his private property, and not by any act or assent of his dedicated to public use. The determination of this question may depend upon facts outside of the ordinances of the city, and the proceedings thereon necessary to make out the purchaser's title.

It may be important to the complainant to have an immediate decision of this question, it being one of fact, and depending upon the presence of witnesses, whose memory and life, and accessibility, he is unwilling to risk to the chances of a future litigation. Waiving then the objection which might well be taken to raising this question upon the final hearing, we are not prepared to say that the case presented by the bill may not have been a proper one for an injunction.

The dissolution of the injunction upon the final hearing presents the only question remaining to be determined. We should be unwilling to venture any definite opinion upon the question of dedication. We are not in possession of all the facts which may have been before the circuit court, and every presumption is in favor of the decree. We must, however say, that so far as the case is presented by the bill, and answer, and exhibits, we should incline to the inference that this alley was fully within the jurisdiction of the corporate authorities of St. Louis. The charter of the city authorises the council to "open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve and keep in repair, streets, lanes, avenues and alleys." The power of grading and paving alleys is doubtless limited to such alleys as are public. The power to establish, open or widen alleys, necessarily implies a power to create an alley where none before existed; but this, we presume, could only be done by making compensation, or upon the assent of the proprietors. Other provisions no doubt point out the steps to be taken in exercising this power of opening or establishing streets and alleys. The city authorities, in this case, certainly treated the alley now claimed by the

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complainant as his private property, as a public alley, and the answer on the record sets up this defence. In 1839 the alley was open and used by the public without objection. In the same year the city surveyor reported to the board of aldermen, that this alley had been surveyed by him as city surveyor, by authority of the proprietors, which report (it is stated in the answer) is found in the printed journal of said board. In 1840 an ordinance was passed (8th Sept. 1840) making it the duty of the street commissioner to report to the city council every unpaved alley, which by reason of its remaining unpaved could not be kept clean; and for the directing the commissioner, upon the passage of an ordinance for such purpose, to cause such alley to be graded and paved, and apportion the costs among the owners of the lots bordering thereon agreeable to their respective fronts. It appears that in pursuance of this ordinance the street commissioner, on the 27th Oct., 1840, reported to the city council that this alley, being unpaved, could not be kept in proper condition, and again in 1841 made a similar report, declaring further that said alley was a public nuisance. In consequence of these reports, an ordinance was passed on the 17th June, 1841, authorising the city engineer to have this alley graded and paved, and it was done accordingly.

What facts or circumstances will be sufficient to warrant a court or jury in declaring private property to have been dedicated to public use, either as a street or alley, must necessarily vary in every case. General rules may be settled, and have been settled, but after all the question is one of fact, and must be governed by its own circumstances. In *Jarvis vs. Dean* (3 Bingh. 447,) the court allowed the jury to presume a dedication to public use, if they thought the street had been used for years as a public thoroughfare, with the assent of the owner of the soil; and although in that case the street had not been opened or used as such but from four to five years, that circumstance was not considered conclusive against the dedication; on the contrary, the court said that no particular length of time was necessary to establish a dedication, although this circumstance was entitled to weight, where the acts were in other respects of a doubtful character.

The principle was fully recognised and acted upon by the supreme court of the United States in the case of *Cincinnati vs. White's lessees*, (6 Peters, 431) and by this court, in the case of *Carlin vs. Paul* (10 Mo. R.) In the case of the city of Cincinnati vs. White lessees, the court held that to constitute a dedication, it was only necessa-

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ry to appear that the ground had been used for the public purposes, and that this use had been with the assent of the owner.

In the present case, the complainant laid off an alley from his lots for his own convenience, but permitted the public to use it. The adjoining proprietors accommodated their improvements to the same, and accordingly there was a public thoroughfare of thirty feet wide through the entire block, extending from one street of the city to another. The complainant does not pretend that any indications were given by him, that this alley was for his exclusive use. No gates or inclosures of any sort were erected to signify an intention of excluding the public. Every one was permitted to pass without objection. It was surveyed by the city surveyor, not only without objection, but at the request of the complainant and the other proprietors. Reports are made to the city council of its uncleanly condition, and ordinances are passed to cause it to be graded and paved. The proceedings of the council and its officers are duly printed in the city papers. No obligation is imposed upon the city authorities to give a special notice in these cases, and if there was, it does not appear that the complainant was either absent or ignorant of these proceedings. The officers of the city proceed to execute the ordinance, by entering upon this alley and actually grading and paving it. All these things are done without objection or remonstrance, and it is not until the tax is sought to be collected that we hear a complaint. It is strange that the complainant could suffer the city officers to send their servants upon his private lots and pave them without remonstrance, if he still regarded them as private property, and not open to the public use. We have no evidence that the complainant was ignorant of these proceedings. He does not allege any want of notice in his bill, and the answer asserts that he was not ignorant of them, and there is no proof on the record. Under these circumstances, we do not see how the corporate authorities could regard this alley in any other light than a public thoroughfare.

We do not lay much stress upon the fact stated in the complainant's bill, that he intended the alley and laid it off for his own private use. This is not at all inconsistent with his assent that it might be used by the public. The motive which influences almost all such appropriations or dedications, is the convenience and accommodation of the proprietor and an enhancement of the value of his property remaining. All the proprietors along this alley were doubtless influenced by similar motives. Their own convenience and the value of their lots were promoted by allowing this alley to be a public thoroughfare.

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Without, therefore, feeling warranted in such a record in dedicating how far the complainant had parted with his exclusive control over the land upon which this alley was laid off, we shall affirm the decree of the circuit court dismissing the bill.

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